IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ACCU-SPEC ELECTRONIC
SERVICES, INC.,
Plaintiff

v. CIVIL ACTION NO. 03-394 ERIE

CENTRAL TRANSPORT
INTERNATIONAL, INC. and
LOGISTICS PLUS, INC.,
Defendants

JURY TRIAL - DAY NO. 2

Proceedings held before the HONORABLE

SEAN J. McLAUGHLIN, U.S. District Judge,

in Courtroom C, U.S. Courthouse, Erie,

Pennsylvania, on Tuesday, October 18, 2005.

APPEARANCES:

W. PATRICK DELANEY, Esquire, appearing on behalf of the Plaintiff.

JEFFREY D. COHEN, Esquire, appearing on behalf of Defendant Central Transport International, Inc.

W. JOHN KNOX, Esquire, appearing on behalf of Defendant Logistics Plus, Inc.

Ronald J. Bench, RMR - Official Court Reporter

2

I N D E X

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
FOR THE PLAINTIFF:				
ERNEST CARLSON				
By Mr. Delaney -	--	--	13	--
By Mr. Cohen -	--	--	--	16
By Mr. Knox -	--	4	--	--
JAMES MULLEN				
By Mr. Delaney -	23	--	70	--
By Mr. Cohen -	--	43	--	--
By Mr. Knox -	--	57	--	--
JOE FISHER				
By Mr. Delaney -	101	--	--	--
By Mr. Cohen -	--	111	--	--
By Mr. Knox -	--	118	--	--

- - -

FOR CENTRAL TRANSPORT:

GEORGE HORETSKY				
By Mr. Cohen -	73	--	134	--
By Mr. Knox -	--	90,121	--	--
By Mr. Delaney -	--	123	--	--
JEFFREY CACKOWSKI				
By Mr. Cohen -	138	--	--	--
By Mr. Knox -	--	163	--	--
By Mr. Delaney -	--	170	--	--

- - -

EXHIBITS:	IDENTIFIED	ADMITTED
FOR THE PLAINTIFF:		
Plaintiff's Exhibit 24	37	--
Plaintiff's Exhibit 25	71	71
Plaintiff's Exhibits 1 - 25	120	121

FOR CENTRAL TRANSPORT:

CT Exhibit 5	27	27
CT Exhibit 2	50	56
CT Exhibit 9	51	56
CT Exhibit 8	53	56
CT Exhibit 10	54	56
CT Exhibit 51	63	--
CT Exhibit 1	82	--
CT Exhibit 13	140	--
CT Exhibit 3	142	161
CT Exhibit 4	150	161
CT Exhibit 7	158	161
CT Exhibit 16	161	161

FOR LOGISTICS PLUS:

LP Exhibit 1	94	96

- - -

P R O C E E D I N G S

(Whereupon, the Jury Trial proceedings began at 9:05 a.m., on Tuesday, October 18, 2005, in Courtroom C.)

THE COURT: Good morning, ladies and gentlemen. All right, would the witness resume the stand, please. I think we were up to you, Mr. Knox.

MR. KNOX: Thank you, judge.

ERNEST CARLSON, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

CROSS-EXAMINATION

BY MR. KNOX:

Q. Good morning, Mr. Carlson.

A. Good morning.

Q. You are president of Accu-Spec, correct?

A. Yes.

Q. Can you hear me better now?

A. Yes.

Q. Mr. Carlson, are you aware of any written documentation sent by Accu-Spec to Logistics Plus that specifically told them that this was an X-ray machine that needed to be shipped?

A. No, I'm not.

Q. Similarly, are you aware of any written documentation

that was sent by Accu-Spec to Logistics Plus that tells them
that this was a fragile piece of freight?

A. No, I am not.
Q. Lastly, are you aware of any written documentation that was sent by Accu-Spec to Logistics Plus that specifically tells them that this was a $120,000 piece of freight?
A. No, I'm not.
Q. Mr. Carlson, yesterday I believe you said that this freight was not a typical shipment for Accu-Spec, am I characterizing your testimony more or less correctly?
A. That's correct.
Q. Is it fair to say that this was one of the more valuable shipments that Accu-Spec was going to be shipping back in 2002, 2003?
A. It is one of the most valuable shipments that we would receive.
Q. And, again, this is a $120,000 shipment, correct?
A. Yes.
Q. Mr. Carlson, I guess what I'm struggling with, what my

client is struggling with, if this equipment is so atypical, so valuable, somewhat important to your company, why wouldn't you send any written documentation to Logistics Plus telling them exactly what this shipment was?

A. I believe and, once again, I had asked my program manager, Jim Mullen, to arrange for the shipment. And, although, we've called it equipment, we called it an X-ray machine, we did not call it anything but that.

6

Q. I know you called it that --

THE COURT: Hang on a second, you've got to let him finish. You've got to keep your voice up. Pretend you're in the warehouse yelling at a guy across the way. Do it that way.

THE WITNESS: All right. Exactly how Jim expressed this to Logistics, I do not know. I know that he had phone conversations with him. And should have been described as the equipment, or the X-ray machine, whatever, we had nothing to hide. It would be silly to presume that we went and bought an above average machine, we could have got a $60,000 machine and been in business, but we went for the very best. We arranged to have to a rigger there to pick the machine off. It does not make sense to try and save a few hundred dollars on freight.

BY MR. KNOX:

Q. Mr. Carlson, yesterday I believe you also said that after you issued your letter of February 21, 2003, marked as Plaintiff's Exhibit 20, if I may show you -- may I approach?

THE COURT: Sure, you don't have to ask permission.

THE WITNESS: Okay.

BY MR. KNOX:

Q. That's the letter I'm talking about?

A. Yes.

Q. Correct me if I'm wrong, I believe your testimony as to yesterday was after the issuance of that letter, that you didn't get any response from anybody, was that your testimony?

A. That's correct.

Q. But isn't it true that in fact after that letter was issued, Mr. Fanzini, Chris Fanzini of Logistics Plus, was in constant communication with Mr. Mullen seeking to address this issue?

A. I did say that there was some verbal communication, but nothing of any value or consequence.
Q. Are you aware of any e-mails that were in fact sent back and forth between Mr. Fanzini and Mr. Mullen?
A. There could have been, but right now, no.
Q. Accu-Spec submitted a formal claim, it looks like, on April 4, 2003, I'm going to put that up on the screen -- do you see that document, sir?
A. Yes, I do.
Q. Would you agree that that claim is against Central Transport and Central Transport only?
A. Yes, it is.
Q. Is Logistics Plus even mentioned anywhere on that document?
A. No, it is not.
Q. Similarly, on May 22, 2003, it appears that your attorney sent a letter right after the formal claim to Central Transport basically reiterating that you wanted Central Transport to pay the claim, is that correct?
A. I cannot read this document.

Q. I'll show it to you.
MR. COHEN: Your Honor, with respect to this document, it contains hearsay, we object to its admittance.
THE COURT: I can't read the document, either, so I don't know if it contains hearsay or not, let me see it. Well, as an initial matter, it's important for me -- are you even moving this document, because if you're not moving the document, it obviates, it moots your objection, doesn't it?
MR. KNOX: I am going to move it.
THE COURT: Let me see you at side bar.
(At side bar on the record.)
THE COURT: Let me read it. All right. Let's do it this way, what is the relevance of this?
MR. KNOX: We are trying to establish that, basically, Accu-Spec is making a claim against Central Transport --
THE COURT: You can establish that without the content of the letter. You have a hearsay objection?
MR. COHEN: It's hearsay, also a consequential set of damages that shouldn't be presented. As well as the

settlement issues.

THE COURT: You can reference the letter, who it's addressed to, if it's not addressed to anybody else. And then you can argue whatever inference you want to the jury from that.

(End of discussion at side bar.)

THE COURT: Take that off the screen.

MR. KNOX: Yes, your Honor.

BY MR. KNOX:

Q. Mr. Carlson, what I'll ask you is, were you aware that your attorney sent a letter to Central Transport, after you made a formal claim to Central Transport, that your attorney sent a letter on May 22, 2003, to Central Transport basically demanding payment?

A. Yes.

Q. Was a similar letter sent to my client, Logistics Plus, around that time demanding payment?

A. I do not know that.

Q. Mr. Carlson, did Accu-Spec eventually send a letter to

Central Transport demanding full payment several months later in November of 2003?
A. We may have, I cannot recall right now.
Q. Isn't it true that you basically tried to have this claim resolved with Central Transport first, and then tried to resolve it with Logistics Plus after Central Transport denied your claim?
A. We asked Central Transport because they were the firm that actually had delivered the equipment to our facility. And we also included Logistics because they were the people that we hired to get the freight to our facility.

10

Q. And you've acknowledged that you did receive a denial letter from Mr. Cackowski from Central Transport saying we're denying your claim because we have a signed delivery receipt and for a number of other reasons?
A. Yes.
Q. In that letter from Central Transport, did they give you any idea as to why you might want to bring a claim against Logistics Plus?

A. No.

Q. Did Central Transport at any time give you an idea as to why you think Logistics Plus should be involved?

A. Central did not, no.

Q. Mr. Carlson, this shipment was delivered February 14, 2003, correct?

A. Yes.

Q. Had you dealt extensively with Logistics Plus prior to this shipment?

A. Me personally, no.

Q. Had Accu-Spec shipped other pieces of freight with Logistics Plus prior to this shipment?

A. I think we did have some transactions, but I could not tell you what they were.

Q. Do you know if Accu-Spec in fact used Logistics Plus to negotiate prices on other shipments after this freight was delivered and discovered to be damaged?

11

A. I know that we've had business dealings, yes.

Q. In fact, isn't it true that Accu-Spec has used Logistics

Plus even after it sued Logistics Plus in this case?
A. I know that we had the machine transported back to England and back into the states again through Logistics.
Q. I'm not talking about that machine, I'm talking about any other shipments unrelated to this case?
A. I believe that there probably are, yes.
Q. Mr. Carlson, would you agree that Mr. Fanzini, on behalf of Logistics Plus, responded the same day when you reported that there was an issue with this freight?
A. Yes. Could I elaborate on that?
Q. That's fine.
A. Okay.
Q. Mr. Carlson, I want to put another document up here. That's one of the pictures of my copies of exhibits, it's not as clear, but I believe that's a picture that's been referenced; have you seen that picture before?
A. Yes.
Q. Specifically, I believe it's referenced as Plaintiff's Exhibit 9. Mr. Carlson, do you see any symbols on this crate?
A. Yes, I do.
Q. What symbols do you see?
A. The umbrella and the glass.

Q. What is your understanding of what the glass or wine

glass symbol means?
A. Fragile.
Q. Do you have any experience in learning about the symbols on crates?
A. Some, yes.
Q. How did you know that that wine glass means fragile?
A. From some past receipt, even on small boxes that is on there.
Q. I'm almost done here, Mr. Carlson. In looking at some of those pictures yesterday in response to questions from your attorney, it looked like there was a computer screen on the outside of the X-ray machine, would you agree with that?
A. I believe there was, yes.
Q. Isn't it true there's some glass components, including that computer screen, that are part of this X-ray machine?
A. I would imagine there is some glass, yes.
Q. Lastly, Mr. Carlson, I believe yesterday you said something that with regard to this shipment, that price was not

an issue; do you remember saying something like that?
A. Right.
Q. Were you aware that Mr. Mullen, your employee who was negotiating with Logistics Plus here, was trying to get a good price on this shipment?
A. All I know is that he did make arrangements for the shipment and the amount we paid.

13

Q. Did you at anytime instruct him to get the best deal possible?
A. No, all of our employees naturally ask for the best deal possible, just as we did on the X-ray machine. But we do not do anything that's going to harm ourselves or, you know, do anything that would do any harm to the equipment that we're trying to get into our facility.
Q. Mr. Carlson, have you reviewed any of the deposition transcripts in this case in preparing for your testimony here today?
A. No.
Q. You haven't reviewed any of them?

A. All I know is through the documentation that we had at our facility.

Q. Are you aware, in any form whatsoever, that Mr. Cackowski has indicated that the Class 50 rate was essentially the cheapest rate at which to ship?

A. I learned of class rates after the damage was incurred. I had no idea what class rates even were prior to that.

MR. KNOX: Thank you, that's all I have.

THE COURT: Any redirect?

MR. DELANEY: Just a few, your Honor.

REDIRECT EXAMINATION

BY MR. DELANEY:

Q. Mr. Carlson, that's Exhibit 9 on the screen, that's the

picture that Mr. Knox just showed you?

A. Yes.

Q. What does the umbrella refer to?

A. Do not get wet.

Q. To your knowledge, is this something, these symbols something that are commonly used in shipping?

A. Yes.

Q. Even in the small type of shipping boxes that you use?

A. Yes.

Q. You explained to me, actually this morning, that you have some background in packaging, don't you?

A. Well, I do have an interest in a packaging company.

Q. Tell me what you mean by a packaging company?

A. We have a facility that's got about six or seven full-time employees that package materials for a particular customer. And involves putting things in boxes and crates and so forth.

Q. Have you ever gone down there and actually worked yourself?

A. I have when we've been in a big pinch, I've gone down at the end of the year.

Q. Does that company ever ship, has it ever shipped anything as large as this X-ray machine, two-and-a-half tons?

A. No, probably a ton-and-a-half.

Q. All right. And would the ton-and-a-half piece -- was it equipment, by the way?

A. No -- well, it would be equipment and sheet metal.

Q. And are you familiar with how that was packed?

A. Yes.

Q. Or crated?

A. Yes.

Q. With that knowledge and the fact that you looked at the crating with regard to this machine when it arrived on February 14th, do you have any opinions about the appropriateness or the effectiveness of the crating of this particular machine?

MR. COHEN: Your Honor, objection.

THE COURT: Let me see you over at side bar. Members of the jury, we've had a few side bars, let me just tell you what they are. Remember I told you that you are the finders of fact. We're discussing legal issues over there which don't involve you, we try to keep those to a minimum, but they are kind of a necessary evil.

(At side bar on the record.)

THE COURT: Okay.

MR. COHEN: It has not been established sufficient to give an opinion with respect to how good or bad the packaging was. It's potentially prejudicial testimony, and he has no personal knowledge and foundation.

MR. DELANEY: It falls under 701 with regard to lay testimony. He's familiar with the packaging of a large piece

of equipment.

THE COURT: Let me just read it to refresh my recollection. I'm going to overrule the objection, under 701 there is a sufficient foundation laid. I'm going to overrule the objection.

(End of discussion at side bar.)

BY MR. DELANEY:

Q. Mr. Carlson, based upon your experience in having seen that package or that crate on February 14th, do you have an opinion about the appropriateness or the effectiveness of that particular crating of that equipment?

A. We did not see anything to question the crate, it did look fine. Especially since the equipment actually went through the bottom of the crate.

Q. In your opinion, did this machine somehow shift or wiggle inside the crate?

A. No, no way.

Q. Did you reach some conclusion about how the damage to the crate and the equipment must have occurred?

MR. COHEN: Objection, your Honor.

THE COURT: Overruled. When you make an objection, I presume it's a foundational objection, I don't want to put words in your mouth?

MR. COHEN: It goes to the conclusion as to how the damage, foundational and knowledge, yes, your Honor.

17

THE COURT: It's overruled. This goes for everybody, in the future when you make an objection, it's not enough to make an objection, you have to state the basis for it because I can't guess. Go ahead.

BY MR. DELANEY:

Q. My question was did you reach a conclusion about how the damage to this crate and the damage to the equipment had occurred?

A. Yes, the crate was dropped.

Q. Okay. I noticed that when Mr. Knox was questioning you, you were asked a question about whether Mr. Fanzini from Logistics Plus had had some conversations after the claim had been made, and you wanted to say more and Mr. Knox I guess didn't want you to say more. Do you recall what you wanted to say?
A. Yes. I wanted to say we did have communications with Chris, he was helpful to the point that everything was Central's fault.
MR. DELANEY: Thank you.
THE COURT: Anything further?
MR. COHEN: If I may, just some brief recross with respect to this witness. Thank you, your Honor.
RECROSS-EXAMINATION
BY MR. COHEN:
Q. Mr. Carlson, you've testified that you have some

18

familiarity with packaging, correct?
A. Some, yes.
Q. You've not worked in the shipping department, you're the

CEO of the company, correct?

A. I'm the president.

Q. You're the president?

A. Yes.

Q. On a daily basis do you package freight?

A. Not everyday, no.

Q. Right. If there's somebody sick, you have to fill in, you go take care of what has to be taken care of in any department within the company, is that fair to say?

A. Yes, it is.

Q. With respect to shipments that generally are shipped from Accu-Spec, my understanding is you go through UPS, is that correct?

A. Yes.

Q. You usually have small shipments, correct?

A. Yes.

Q. Maybe bubble wrap, those peanut kind of foam --

A. Peanut foam and packaging, yes.

Q. As far as your experience in shipping a one-and-a-half ton piece of equipment, I mean is this a regular occurrence?

A. For the other business, yes, it is.

Q. How many times have you personally packaged a

ton-and-a-half piece of equipment?
A. Myself, probably been involved once or twice.
Q. Okay. So would it be fair to say you have very limited experience, exposure to packaging heavy equipment?
A. If you want to say that, okay.
Q. Sir, are you familiar with a document called the National Motor Freight Classification?
A. No.
Q. Okay. Are you familiar with or do you know or have you discussed with anybody the contents since this litigation has started of the National Motor Freight Classification?
A. Not to my knowledge.
Q. I'm going to show you a page from the National Motor Freight Classification -- your Honor, it's on the overhead and ask the witness some questions about it, if that's okay.
THE COURT: All right.
BY MR. COHEN:
Q. First, I'm going to show the face of the book, this is the National Motor Freight Classification, and this one happens

to be from 2004. It's about two-inches thick and I'm turning to page, it's three-inches thick, I'm turning to page 200. And it is the section which specifically deals with packaging for crates. If you believe it, there is a specific requirement for packaging crates, nothing left to chance. My question is, Mr. Carlson, can you read this -- can you see this?

A. If it stops moving. Yes, I could see it.
Q. This indicates that crates or containers --
THE COURT: That's too fast, my court reporter is having a hard time.
MR. COHEN: I'm going to slow down, thank you, your Honor.
BY MR. COHEN:
Q. "Crates or containers constructed of members made of song wood or structural panels or metal with anchors between or members made of song wood or structural panels or metals combined with fiberboard." It goes on to describe specifically how a crate should be put together. Then there's a subheading wooden crates. "Other than wire bound crates, crates must be

constructed as follows. The lumber must be seasoned, reasonably sound and free from cross grain and knots, which would interfere with nailing or stapling or knots which are greater than one-third of the width of the lumber." Did you inspect the wood to determine if it qualified pursuant to this instruction as far as wooden crates?
A. No.
Q. Number two, "crates must be constructed with outer framework consisting of uprights and horizontal members and with additional diagonal upright and horizontal members where necessary to provide proper strength and rigidity." Did you inspect to see that this structural integrity was provided in

21

the crate?
A. I would say that the crate demonstrated those features. Although, I'm unaware of this document.
Q. Let's take a look for a second at the crate. This is the crate, Exhibit 9. It says crates must be constructed out of --
THE COURT: Say that one more time.
MR. COHEN: I'm going to slow down.

THE COURT: You are going to slow down.

MR. COHEN: It's very difficult. Thank you.

BY MR. COHEN:

Q. "Crates must be constructed with outer framework consisting of upright and horizontal members and with additional diagonal upright and horizontal members where necessary to provide proper strength and rigidity." In the picture do you see any vertical members?

A. Yes.

Q. Do you see any diagonal members?

A. No.

Q. The next one, number three, I'll just read it rather than have it up on the screen. "Crates must be constructed with three-way locking corners, where members will be joined with nails or staples driven into side grain of adjoining members." Did you inspect this crate to see if that was complied with?

A. No.

Q. Four, "all adjoining crate members must be fastened by

double nailing or stapling." Did you inspect the crate to see

if that was complied with?
A. No.
Q. "Crates must be designed and constructed with transverse cross members at base of sufficient strength to protect the underside article from damage by mechanical handling equipment." Did you specifically inspect the crate to determine if that characteristic was met?
A. We did see that, yes.
Q. The next one is structural paneling, including plywood or strand board and wafer board, must be manufactured with exterior glue. Were you able to figure that one out from the crate?
A. No.
Q. Is it fair to say you do not know if this crate meets these specifications?
A. You could be correct.
MR. COHEN: Thank you, Mr. Carlson.
THE COURT: Anything further of this witness?
MR. KNOX: No, your Honor.
THE COURT: All right, sir, you're excused.
MR. DELANEY: Your Honor, we're going to call Mr.

Mullen to the stand.

THE COURT: All right. Mr. Mullen, come on up here, stand in front of my deputy clerk and she's going to administer

the oath to you.

THE CLERK: Raise your right hand.

JAMES MULLEN, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. DELANEY:

Q. Mr. Mullen, could you tell us your full name, your business address and your current occupation?

A. My name is James M. Mullen, my occupation is I'm a sales rep for a company called Marsh Electronics, and I work out of my house, that's my office and my address is 3716 Main Street here in Erie.

Q. Let's talk about your work history. I understand at one point in time you worked for Accu-Spec, is that correct?

A. Yes, I worked for Accu-Spec Electronics from 2001 until 2004.

Q. And prior to working for Accu-Spec, where were you?

A. I spent 22 years in the Navy, and then I worked for a company called Advocom, which was a small distributor out in McKean. And then I worked for a couple other distributors because the companies I worked for were bought by bigger companies, which kind of eliminated the competition.

Q. I'm sorry, what date did you leave Accu-Spec?

A. I left there in February of 2004.

Q. All right. Did your leaving Accu-Spec have anything to do with the events that we're talking about in this lawsuit?

A. No, sir, this was just an opportunity for me to do something different.

Q. Thank you. Back in 2003, what was your position or what were your duties at Accu-Spec?

A. I was the program manager there, and I had several duties. I had shipping, receiving was a responsibility. Training, facilities maintenance, different things like that.

Q. Do you recall in either late 2002 or early 2003 being told that Accu-Spec was going to buy and receive a piece of new equipment, an X-ray machine?

A. Yes, there was a discussion about that.
Q. And what involvement did you have with either the purchase or the acquisition or the receipt of that piece of equipment?
A. I really had no involvement in the purchasing of it, that was Ernie and the operations manager's area that they were working on. I was only called on to have it shipped.
Q. Do you remember who spoke with you about that?
A. Ernie did.
Q. Did Mr. Carlson give you any instructions about how it should be shipped or with what company you should have it shipped or any details like that?
A. No, he didn't. He left that up to me.
Q. Did you receive any instructions from Mr. Carlson or anyone else to try to negotiate some low rate for shipping?

25

A. No, I didn't.
Q. By rate I mean price?
A. No.
Q. What did you do, Mr. Mullen, what did you do when you

received this assignment?
A. When I got all the information from Ernie, I contacted
Chris Fanzini of Logistics Plus --
THE COURT: Slow down a little bit, sir, you're speeding up too much. Go ahead.
THE WITNESS: I contacted Chris Fanzini and I told him that I had some equipment that needed to be moved from California to our facility in McKean. And I gave him all the dimensions and the weight, and that's how I left it. I asked him to just get me a quote.
BY MR. DELANEY:
Q. Okay. And Mr. Fanzini was an employee of Logistics?
A. Yes.
Q. Had you dealt with Logistics before this transaction?
A. Yes, we had been.
Q. Tell us about that, what did you know about Logistics or how had you dealt with them?
A. Logistics Plus, typically when we had a move, we had a customer in Sharpsville that we would consolidate shipments for once a month. So we would put it on a skid and we would have Logistics Plus move those for us through a trucking company.

Q. Okay. And was it always Mr. Fanzini that you worked with?
A. No, after the initial transaction was set up to move this freight for us on a regular basis, I would simply call the facility and talk to whoever answered the phone and tell them that we had a shipment that was ready to go to Sharpsville. And they would send a truck out to pick it up.
Q. Mr. Fanzini is related to you, is he not?
A. Yes, sir, he's my son-in-law.
Q. Does he still work for Logistics, if you know?
A. No.
Q. And he was your son-in-law back in 2003, I presume?
A. Yes, he was.
Q. Was it customary or unusual for Accu-Spec to be arranging a shipment of a piece of equipment as large as this X-ray machine?
A. Yes, it was. Because that wasn't what we typically dealt with.
Q. Was it customary or was it infrequent, that was the question?

A. It was infrequent.
Q. Now, you speak to Mr. Fanzini, you ask him to take a look at arrangements for the shipment of this particular piece of equipment, is that right?
A. Yes, sir.

Q. All right. I'm going to show you a document that is Defendant's Exhibit CT-5 -- I want to show it to you first and see if you are familiar with it?
A. Yes, I am.
Q. Tell us what that document is?
A. That's an e-mail from myself to Chris Fanzani, giving him more detailed instructions on what we needed, we needed equipment picked up from Dage Precision in California. I gave him the contact's name out there, the phone number, the dimensions and the weight of the equipment. And that's what I sent to him.
MR. DELANEY: Your Honor, I'd move for the admission of Defendant's CT-5.
THE COURT: It's admitted.

BY MR. DELANEY:

Q. Let me show this to you. Jim, is this off your e-mail, would this be a hard copy of your e-mail?

A. Yes, it is.

Q. In it do you describe this as a crate or as equipment?

A. I describe it as equipment.

Q. What is, just for the record, what's the name of the company from whom the equipment will be picked up?

A. The name is Dage Precision Industries, Inc.

Q. All right. And then you give the phone number of Dage, I presume?

A. Yes.

Q. And Bonnie Nichols is who?

A. She was our point of contact, the shipping person that they would contact out there to arrange for the pick up of this equipment.

Q. Okay. And the size and weight of the crate, is that right?

A. Yes, that's correct.

Q. The price and then when and where it's to be delivered, is that correct?
A. That's correct.
Q. So you didn't just say to the people at Logistics, hey, we have a crate?
A. No, sir.
Q. You told them we have a piece of equipment?
A. That's correct.
Q. It's from Dage Precision Industries?
A. That's correct.
Q. Before this e-mail was sent by you, you obviously received a quote from Logistics for the price for shipping?
A. Yes, I did.
Q. Did that come to you verbally or by writing, if you know?
A. It came verbally, I believe it also came in an e-mail with the initial quote on it.
Q. Did you get any other quotes from Logistics, in other

29

words, did they give you alternative quotes in any way?
A. No.

Q. Did you ask for a lower price when you got the quote?
A. No, I didn't, because I didn't know anything about shipping this big of equipment, so that quote sounded reasonable to me.
Q. Do you know anything about the class of various freight shipments?
A. No.
Q. Once you sent this e-mail to Mr. Fanzini, did you receive any further documents confirming that you had made these arrangements with Logistics?
A. No, I didn't. Not that I can recall.
Q. Did you receive any documents, further documents from Logistics about the details of this shipment; who the trucker would be, for example?
A. No, I did not.
Q. When was the first time that you became aware that Central Transport was actually physically moving the equipment?
A. When it was delivered to our facility.
Q. When Central Transport picked up the equipment in California, does anyone give you a confirmation that it's been picked up?

A. No.

Q. Okay. And between the date of pick up and we know or we

will know soon that the pick up occurred on February 5th, and the delivery occurred on February 14th. In that period of time, are you aware of any contact with either Central Transport or Logistics, that you're in contact with those?

A. I called Logistics Plus a couple times just to check on the progress of the freight, to make sure it was on time to our facility because we had already arranged for riggers to come to move the equipment for us.

Q. Is that Rog's?

A. Yes.

Q. Were you present when the equipment arrived on February 14th?

A. Yes, I was.

Q. And who else was there, if you remember?

A. Ernie Carlson was there, the riggers were there, and we had several employees out there just for kind of logistics support, so when he opened up the crate, we could get the equipment moved into the facility without a lot of problems.

Q. Was there any representative of Logistics Plus present?

A. No.

Q. What do you remember about your first view of this crate?

A. Well, when the truck pulled into the parking lot, they opened up the truck and we could see this crate was all the way in the back of the truck ready to be moved out. And the riggers started to position themselves and Ernie and I were

trying to look --

THE COURT: Slow down.

THE WITNESS: I'm sorry. To look at the crate to see if there was any type of damage, like we normally would do when things arrive at our facility. We did see something on the top part of the crate, but we really couldn't tell what that was because there was no room to get into the truck to kind of walk all the way around the crate to look for any damage.

BY MR. DELANEY:

Q. Did the rigger then remove the crate from the truck?

A. Yes, they did.

Q. Is this, by the way, a flat bed or is it a boxed trailer?

A. It's a boxed trailer.

Q. Once on the ground, were you able to examine the crate?

A. Yes, we were.

Q. What did you see?

A. We found more damage to the crate actually when it was being moved off the bed or off the truck, I'm sorry, off the back of the box truck, we saw what looked like some damage on the bottom of the crate and there was more damage on the side and top of the crate that we could see.

Q. I'm just going to quickly show you a couple of photographs. This is Plaintiff's Exhibit 10, is that a photograph that's familiar to you?

A. Yes, that's the portion of the crate that was damaged.

Q. Do you know when the photograph was taken?

A. It was taken after the crate was put on the ground at our facility.

Q. Let me show you what's been marked as Plaintiff's Exhibit

12, is that photograph familiar to you?
A. Yes, it is. That's the photograph of the damage on the bottom of the crate, after it was taken off the back of the truck.
Q. Once it was on the ground, were you able to open the crate?
A. Yes, we were.
Q. By the way, was the crate locked in any way?
A. No.
Q. Was it sealed with any kind of shipping bands around it?
A. No, it wasn't.
Q. Did you see any markings on the crate indicating that do not open?
A. No.
Q. How was the crate fastened together?
A. The sides were all fastened with bolts, through nuts and bolts, it looked pretty sturdy.
Q. When you wanted to open it, did it take much effort to get it open?
A. Not a lot of effort to open it, just remove the nuts and

bolts and the side would come right off.
Q. Once you opened the crate and looked inside, did you see damage to the equipment?
A. Yes, we saw more damage to the tray on the front portion of the equipment.
Q. I'm showing you Plaintiff's Exhibit 15 on the screen, is that photo familiar to you?
A. Yes, it is.
Q. What does it depict?
A. It depicts the damage that's on the inside of the crate to the equipment that was the X-ray machine. The front portion looked like it was bent.
Q. Is that an accurate depiction of the damage you saw on February 14th?
A. Yes, it is.
Q. Let me show you one other picture, Plaintiff's Exhibit 18. Is that photograph familiar to you?
A. Yes, it is.
Q. What does it depict?
A. That depicts the bottom of the machine, the bottom of the crate where it looked like it had gone through the flooring of

it.

Q. Mr. Mullen, when you looked at this piece of equipment, when you opened the crate, when you examined the crate itself, did you reach any conclusion about how the damage to the crate

and the damage to the machine had occurred?

MR. COHEN: Objection, foundation.

THE COURT: It's a foundational objection.

BY MR. DELANEY:

Q. Did you have an opportunity to look at the entire crate itself?

A. Yes, I did.

Q. Did you have an opportunity to look inside?

A. Yes, I did.

Q. Did you have an opportunity to see the type of damage that was done to the crate?

A. Yes, I did.

Q. Did the damage appear to be mostly on one particular side or was it the whole way around the crate?

A. It looked to me to be in one main area.

Q. Would that be the back of the machine or the front where the shelf was?
A. More in the front of the machine.
Q. Based on those observations, could you -- based on where the damage occurred and the nature of the damage, could you reach a conclusion about what apparently happened in damaging the crate?
MR. COHEN: Objection, foundation.
THE COURT: Overruled.
BY MR. DELANEY:

35

Q. Go ahead.
A. Yes, we thought that it perhaps had been dropped.
Q. Now, the truck driver has a receipt for this package, does he not?
A. Yes, he does.
Q. Did he offer that receipt to you?
A. Yes, he did.
Q. What did you do?
A. I signed for the equipment. Because we were getting

ready to handle it ourselves off the back of the truck.

Q. Did you note anything on the receipt?

A. No.

Q. Where is Mr. Carlson when you're signing the receipt?

A. He may have gone back into the building. I don't quite remember who all was standing around when I signed for that.

Q. When Mr. Carlson came back with a camera -- do you remember him retrieving a camera?

A. Yes.

Q. When he came back with a camera, was the truck driver still there?

A. No, I believe he was already leaving our facility.

Q. When you and Mr. Carlson come back together, he with the camera, is there any discussion about what should be done next?

A. Yes, there was. So I immediately contacted Logistics Plus and asked for Chris Fanzini. I told him that the

36

equipment had arrived but it appeared to have been damaged in shipping.

Q. And do you know what happened after that?

A. After that he told me that he would get in touch with Central Transport and then we would figure out what we had to do.

Q. Did Central Transport send a person to Accu-Spec on that day, February 14th?

A. Yes, they did.

Q. Do you know who that person was?

A. It was George Horetsky.

Q. And did this gentleman have an opportunity to look at the crate?

A. Yes, he did.

Q. And did he get to see inside of the crate, the damage to the equipment?

A. I don't really remember if he looked inside the crate, we put the walls back on at that time or if we left them off, I don't really remember.

Q. Do you remember any part of your conversation with Mr. Horetsky?

A. Yes. He told us that it looked like damage that had been done in shipping.

Q. Did he tell you what would happen next?

A. No, he didn't. I was to contact Logistics Plus.

Q. Do you know if Mr. Horetsky was on site for a long period of time or how long he was on site?
A. It wasn't very long.
Q. What happened to the equipment after Mr. Horetsky left?
A. Logistics Plus sent another truck out and they picked the equipment back up and signed for it and took it back into their custody.
Q. Okay. Do you know if it was a Central Transport truck that came back and picked the equipment up to take it to a warehouse or was it another trucking company?
A. I don't remember if it was another trucking company or not.
Q. Do you know where it was taken?
A. It was taken to Logistics Plus warehousing facility.
Q. Do you know how long the equipment stayed there?
A. It was probably there about four months.
Q. Now, at the same time that you're speaking with Logistics Plus and Mr. Horetsky, are you making any effort to contact the

manufacturer of the equipment?

A. Yes, we did.

Q. And that's Dage, is it not?

A. That's correct.

Q. Who did you speak with or who did you contact?

A. We contacted our salesperson, the rep out there, Joe Fisher.

Q. All right. Do you remember how you communicated with him, was it over the phone, was it e-mail, was it correspondence?

A. Initially it was by phone.

Q. And was an effort made to send the digital photographs of the equipment and crate to Mr. Fisher?

A. Yes, it was.

Q. And were you successful in sending them?

A. Yes.

Q. I'm going to show you what we marked as Plaintiff's Exhibit 24, it's several pages, take a look at them and see if they're familiar to you?

A. Yes, these are all familiar to me.

Q. What are they?

A. Those are the correspondence with Joe Fisher at Dage Industries asking him about the machine and the damage that was caused in the integrity of the machine.

Q. I'm going to try to put this up on the screen; is this your e-mail to Mr. Fisher?

A. Yes, it is.

Q. This is the first page of Exhibit 24, is it not?

A. Yes, it is.

Q. In fact, I'll give you a copy in the event I don't get the whole page on the screen. Here's a copy of Exhibit 24 so you can double check what I'm saying. Is that the first page of Exhibit 24?

A. Yes, it is.

Q. I'm sorry, this is from Fisher to you, is it not?

A. Yes, it is.

Q. Is this after Mr. Fisher has received the digital photographs?

A. Yes, it is.
Q. Could you please read into the record, start at the beginning and I'm not going to have you read the whole thing, but I'd like you to read the first few sentences of that paragraph after the salutation, Jim?
A. "I have looked at the pictures and I am afraid the machine may be totaled. The main problem is apparent in picture P2140333. It shows that the corner is crumpled. This system is lined with lead to prevent significant levels of X-rays from escaping from the machine. There is no significant" --
THE COURT: That's incorrect, you didn't read that right. You said there is no, there is no no there.
BY MR. DELANEY:
Q. Reread that sentence.
A. I'm sorry, "there is a significant safety risk if the lead is compromised and you should not try to use the system as it is. The machine should be returned to our Alyesbury, England facility for further evaluation to see if it can be

repaired or if it is a total loss. Please refer to section one of the engineering guide for further explanation on the safety implications. I have attached it to this e-mail."
Q. I'm going to stop you there. I'm going to show you next -- is this e-mail from you to Mr. Fisher?
A. Yes, it is.
Q. What does it say?
A. It says "Joe, do you think that the integrity is still okay. Is there any chance of a leak?"
Q. Let me show you the next page. On this third page of Exhibit 24 is Mr. Fisher essentially repeating what he said in the first message that he sent to you about the safety issues?
A. Yes, he is.
Q. Does he tell you not to power it up, that second paragraph?
A. Yes, he's telling us not to power the machine up.
Q. Do you see where he says in that second paragraph, second sentence, I believe, my main concern is for the safety of you and for the safety of myself. Had you asked whether he could simply come and test it in Erie?
A. I believe we inquired about how we could get it fixed without returning it to England.

Q. Let me show you the next message. Is this your message to Mr. Fisher?
A. Yes, it is.

Q. When you say we are sending it back out today, do you mean away from Accu-Spec or do you mean all the way back to England?
A. We were sending it away from Accu-Spec.
Q. And you asked whether there's any problem with it simply sitting?
A. Yes.
Q. And then the last page, does he get back to you on that question?
A. Yes, he does.
Q. What does he say?
A. He says no, there is only a danger when it is powered up.
Q. All right. Jim, do you see the opening of each message has a from and a to?
A. Yes.
Q. Identify people, and then a time, do you see the time?

A. Yes.

Q. I was completely confused by the times. But Mr. Fisher is in California, is he not?

A. Yes, he is.

Q. There is a compete time difference when these messages are recorded, is that correct?

A. Yes.

Q. All right. After the machine was taken to Logistics Plus's warehouse, did you have any further involvement in it?

A. Yes, I did.

Q. And what involvement did you have?

A. At first we went over just to make sure it was there okay and it was stored. And then shortly thereafter, I contacted Logistics Plus to file a claim. And at that time I was told to file a claim with Central Transport.

Q. Okay. And ultimately was a claim filed with Central Transport?

A. Yes, there was an initial claim filed with Central Transport.

Q. All right. Had you ever filed this sort of a claim before by the way?

A. No.

Q. Did you know if there were any particular forms you had to use?

A. I had no idea.

Q. Ultimately, was the machine sent back to England?

A. Yes, it was.

Q. Do you know when it was returned?

A. Somewhere around September, October of 2003.

Q. Okay. Let me take that exhibit, my copy back from you. Based upon your observations of the crate and your observations of the damage to the machine, is there any way that, based upon your observations, is there any way that you think that this machine could have shifted in the crate and caused this damage?

43

MR. COHEN: Objection, foundation, your Honor.

THE COURT: Overruled.

THE WITNESS: No.

MR. DELANEY: That's all I have, thank you, Mr.

Mullen.

THE COURT: We're going to take a short recess.

(Recess from 10:10 a.m.; until 10:25 a.m.)

THE COURT: All right, Mr. Cohen.

MR. COHEN: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. COHEN:

Q. Good morning, Mr. Mullen.

A. Good morning.

Q. You testified that your employment history is in sales, is that correct?

A. It is right now, yes.

Q. Going back, after the military, you were in sales?

A. No, I was more like a supervisor for production.

Q. What did you do as when you were a supervisor for production, what were your job duties?

A. My job duties at Advocom Electronics, I was the production manager.

Q. And as the production manager, what were you doing?

A. I supervised the group of employees that built electronic kit assemblies.

Q. And at Accu-Spec you were a project manager, is that correct?

A. Yes, I was.

Q. What were your job duties as a project manager?

A. One of my duties was shipping and receiving, I was responsible for the warehouse and for product that came into and out of the building. I was also responsible for the training of employees, facilities maintenance. And other little responsibilities that I was assigned by Ernie and the operations manager.

Q. How much of your time was spent monitoring the shipments?

A. A good part of my day was spent watching shipments going out of the facility or the receiving part of it.

Q. Mostly UPS type shipments, is that correct?

A. Yes, that is correct.

Q. The kind that Ernie described, that had bubble wrap and things like that, correct?

A. Yes, that's correct.

Q. They weren't of a significant weight, is that also right?

A. No, they were not.

Q. It's fair to say that very rarely was a large shipment moved in or out of Accu-Spec such as the weight of this two-ton machine?

A. Yes, that's correct.

Q. Is it fair to say that in your experience -- well, you

45

had very limited experience observing the packaging characteristics of freight that heavy?

A. Yes.

Q. Is it fair to say you have really no or you have very limited or almost no experience in actually packing that kind of freight?

A. That's correct.

Q. Now, besides UPS, what other transportation or shipping companies did you use?

A. Well, we would use FedEx on occasion.

Q. Any other companies?

A. No.

Q. Why did you start using Logistics Plus?

A. Well, when I took over in the shipping area, I found it was easier to use one company whose expertise was shipping, as on opposed to using my time to call around different trucking companies to get quotes. It just made sense to me from a business standpoint to use them.

Q. Besides FedEx and UPS, what other trucking companies were you calling before Logistics Plus?

A. I don't really recall. We may have used a couple local companies for some local deliveries between Erie and like Pittsburgh.

Q. Did your switch to Logistics Plus coincide with the time that your son-in-law was employed there, is that fair to say?

46

A. Yeah.

Q. I mean the reason you began shipping with Logistics Plus, he told you about what they do, you thought it was a good idea, is that fair to say?

A. Yes, that's fair to say.

Q. When did you first learn about Logistics Plus, was it during your conversation with your son-in-law at your home?

A. No, actually, he had called out to our facility to tell me about the company he was working for.

Q. He was looking for some business, is that fair to say?

A. Not really because he knew we shipped mostly UPS.

Q. Did you ever talk with your son-in-law about the type of business that you worked in?

A. Yes.

Q. Did you tell him about this particular shipment, beyond what's in that e-mail?

A. I don't really recall. I usually try to keep -- if I was contacting them, I tried to keep it business. I didn't really talk about work stuff outside of work.

Q. Do you get along with your son-in-law, Chris?

A. Yes.

Q. Does he go over your house for holidays and the whole son-in-law thing?

A. Yes.

Q. At the time the shipment was made, how long had he been

married to your daughter?

A. Couple of years.
Q. You testified that once you were instructed by Ernie that you needed to make arrangements for this freight, that you contacted Chris, is that right?
A. That's correct.
Q. And you testified that you gave him the weight, the dimensions, the origin and the destination?
A. That's correct.
Q. Did you give him any other information?
A. I referred to it as equipment, I just told him we needed the equipment picked up in California.
Q. Did he ask you what it was?
A. I don't recall if he specifically asked me what it was.
Q. That was a telephone call, correct?
A. Yes.
Q. Was he able to give you a rate on the spot or did he have to call you back?
A. He had to call back.
Q. How long did it take him to call you back?
A. I don't really remember, maybe a few hours, I don't recall. And then we started using e-mails.
Q. All right. Let's start with the calls then, if you

remember. Explain to me what the next communication was with your son-in-law about this transportation?

A. Well, he gave me a quote for what it would cost to move the freight from California to our facility.
Q. Let's stop right there. How much was it?
A. $590.
Q. That was the first quote, that was the quote?
A. Yes, it was.
Q. And then after he gave the quote, I don't mean to interrupt you, I apologize, after he gave you the quote for $590, what happened next?
A. Well, I agreed with that quote, to me it sounded reasonable because I didn't know about shipping that type of freight. So I accepted that and sent him the information on picking up the equipment.
Q. And the information is what we just discussed, correct?
A. Yes.
Q. Did he call you back with another rate?
A. Not that I remember, no.

Q. How strong is your memory with respect to the communications related to the transportation of this freight?
A. Well, with the exception of the e-mails, and that's why I tried to do stuff on e-mails, so I would have a record of what I was doing.
Q. So without the e-mails, your recollection is pretty foggy, is that correct?
A. I only recall just asking him to move the freight and get

49

me a quote on it.
Q. Have you read Chris Fanzini's deposition before your testimony today?
A. No.
Q. Would you be surprised if you knew that that deposition testimony indicated that he called you, gave you a quote, and that he said you asked for a better rate?
A. Would it surprise me, yeah, it would.
Q. Are you one-hundred percent absolutely certain that you didn't ask Chris to get you a better rate?
A. Am I one-hundred percent sure, no, I'm not one-hundred

percent sure.
Q. And it's your testimony Chris didn't call you back a second time with a lower rate?
A. Not that I recall, no.
Q. I take it you did not talk to Chris about the specialized nature of this equipment, correct?
A. That's correct.
Q. You didn't ask for any special precautions to be taken in the transportation of this equipment, is that correct?
A. No, I didn't specifically ask for any.
Q. You didn't ask for any particular liability protection for this expensive, high-tech shipment, did you?
A. No.
Q. Should you have?

A. Well, I don't believe I should have. My thought process was that I called a shipping expert, a company that did this for a living, and they told me they would move our equipment for us. So I didn't feel I needed to do anything else.
Q. If there was a limitation of liability, should Chris have

told you that?

A. No, I wasn't aware of a limitation of liability.

Q. If there was, do you think Chris should have told you about it?

A. Yes.

Q. What did you know about this piece of equipment; in other words, did you know anything besides it's an X-ray machine and it's coming from California?

A. No.

Q. What did Ernie tell about this machine?

A. Well, that they had bought an X-ray machine to help with the quality of our work, that it needed to be picked up in California and delivered to our facility.

Q. I'm going to show you a document, sir, I'm going to make it very easy, I'm going to provide, with the court's permission, a set of exhibits for the witness?

THE COURT: That's fine.

BY MR. COHEN:

Q. Sir, would you please flip to what is identified as CT-2, okay, is that your signature on the bottom of this document?

A. Yes, it is.
Q. And what is this document?
A. The packing slip or the receipt for the X-ray machine that was delivered to our facility.
Q. Did you understand that you were signing a document, you were signing for the receipt of the freight in good order?
A. Yes.
Q. You testified that you signed this receipt -- well, let me ask you this. The truck pulls up, the doors opened, the rigger, the forklift shows up. The rigger pulls up to the back of the truck, pulls out the freight, puts it on the ground. It wasn't opened yet, is that when you signed the delivery receipt?
A. Yes.
Q. Did you ask the truck driver to stick around?
A. No.
Q. Did the truck driver stick around until the door was opened?
A. No, he did not.
Q. He wasn't there, he didn't see the machine on the inside?

A. I don't believe he did. I was really kind of busy worrying about what had happened to the machine or what we were going to do next.
Q. I'd like you to flip to Exhibit 9, please, this is a document marked CT-9. This was included in one of the claims

52

submitted to Central Transport; do you know what it is?
A. Yes.
Q. What is it?
A. It's a form that was filled out by a gentleman who came over to do an inspection on the equipment or on the crate and on the X-ray machine for the damages.
Q. Okay, let's find out when he did that, let's look on the top there and the right-hand side where it says "date inspected." What date did he come in and do that?
A. He did the inspection on 2/19.
Q. Okay. And the date delivered was 2/14, is that true?
A. That's correct.
Q. You understand that the trucking company caused this inspection to take place, correct?

A. Yes.

Q. Do you know what a tip and tell device is?

A. Yes, I do.

Q. How do you know?

A. It was on the front of the crate.

Q. What is it?

A. It's a device like, I believe, that would tell if a crate was tipped over or somehow damaged or dropped.

Q. This inspector's report indicates that the tip and tell was not activated, do you see that?

A. Yes, I do.

Q. Do you agree that the tip and tell was not activated?

A. I wouldn't really be able to tell on that because I don't know how activated it would be. I'm not an expert in that.

Q. I'm going to ask you to flip to another exhibit in there, sir, it's number 8. If you can tell me -- well, this is the first claim that Accu-Spec filed with Central Transport, is that correct?

A. That's correct.

Q. And it's listed as $120,000 there and subsequently, because you learned the actual damage, you changed that, correct?
A. That's correct.
Q. Did you fill this form out and sign it on the bottom, is that your signature?
A. Yes, it is.
Q. Did you read it before you signed it?
A. Yes, I did.
Q. Did you read the section in the gray box?
A. Yes.
Q. Did you ask anybody at Accu-Spec whether the equipment was new or used?
THE COURT: I can't read that, I presume the jury can't, either.
MR. COHEN: I'll blow up the section, your Honor, thank you.

54

BY MR. COHEN:
Q. I will also read it aloud for the record. In the gray

box it says "please be aware that our standard liability limit is $10 per pound per container, (10 cents per pound for used articles)." And then there's another sentence, it goes on to say "please check your rules tariff for details." The question is did you ask anybody at Accu-Spec whether the freight was new or used before you filed this claim for over $120,000?
A. No.
Q. You said you read that gray box before you signed it, correct?
A. That's correct.
Q. Did you ask to look at or try to look at on the Internet or anything the Central Transport rules tariff?
A. No, I didn't.
Q. If you could, sir, turn to Exhibit 10, please. If you could tell the jury what this is?
A. This is a second claim re-adjusted after we had the machine inspected by somebody from Dage.
Q. Okay. And did you sign this particular claim form?
A. Yes, I did.
Q. And did you read this one?
A. Yes.
Q. Again, when you filed this supplemental claim form, did

you ask anybody if the machine was new or used?

A. No, I did not.
Q. Did you check the tariff, the rules tariff for details?
A. No.
Q. Sir, I have placed on the screen Plaintiff's Exhibit 13.
Do you see any internal support bracing for the machine at the top?
A. Not in that picture I don't, no.
Q. Are there any pictures that show support bracing at the top of the machine?
A. Not to my knowledge, no.
Q. Was this support bracing at the top of the machine?
A. I don't believe so.
Q. In about the mid point of the machine, do you see support bracing holding the body away from the edge of the crate?
A. No, I don't.
Q. Is there any photograph that you think shows that?
A. No.
Q. Is it because there was no support bracing holding the

body of the machine away from the edge of the crate?
A. Yes.
Q. Do you see in that photograph any hard foam corner packing on the edges of the shelf or on the top of the machine?
A. No, I don't.
Q. When you saw the crate, when you opened the crate door, did you see the big corner hard foam packing?

A. No, I didn't.
Q. When you opened the crate, did you see any straps that were bolting this machine and holding it from internally shifting within the box?
A. No, I didn't.
Q. Do you have any knowledge with respect to the characteristics of tractor-trailer transportation, as far as vibration, natural vibration and movement of a trailer in the normal course of operation?
A. No, I don't.
Q. Do you have any way of coming to a conclusion as to whether or not -- well, based on that, isn't it fair to say you

do not have a basis to come to the conclusion as to whether or not this freight shifted within this box?

A. No, I can't come to that conclusion.

Q. Is it fair to say you can't come to the conclusion, either yes or no, because you really don't have the experience and knowledge about packaging to do so, is that fair to say?

A. Yes, it is.

MR. COHEN: Your Honor, at this time I'd like to move in Exhibits 2, 8, 9 and 10.

THE COURT: Those are admitted.

MR. COHEN: Thank you, your Honor. Thank you, Mr. Mullen, I have no further questions at this time.

THE COURT: Mr. Knox.

57

MR. KNOX: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. KNOX:

Q. Good morning, Mr. Mullen.

A. Good morning.

Q. Mr. Mullen, was this one of the more important shipments

for Accu-Spec during the 2002 period?
A. As far as equipment for the company, yes.
Q. Was it one of the more valuable pieces of equipment that you personally would have been trying to ship for Accu-Spec during that time?
A. Yes.
Q. And, again, how much was this X-ray machine, as far as you knew?
A. How much was the value of it?
Q. Yes.
A. $120,000.
Q. Did you specifically tell Chris Fanzini at any time before the shipment, that this X-ray machine, this item at all was worth $120,000?
A. No.
Q. And in your e-mail that's been marked as Defendant CT Exhibit 5, is there any mention in that e-mail as to the value of this shipment?
A. No, it's not.

Q. You had mentioned, I believe, that there were e-mails in your testimony, if I heard you correctly, around this time with Mr. Fanzini. But isn't there really only one e-mail from you?
A. Yes.
Q. Did you at any time, Mr. Mullen, tell Mr. Fanzini that this shipment was fragile in any way?
A. I don't believe I told him it was fragile.
Q. Did you at any time tell Mr. Fanzini that this was in fact an X-ray machine?
A. I don't believe I ever called it an X-ray machine.
Q. And, again, looking at your e-mails, CT-5 there, is there any mention in that e-mail as to whether this freight is fragile?
A. No, there's not.
Q. Is there any mention in that e-mail that it is in fact an X-ray machine?
A. No, there's not.
Q. I believe in response to questions from your attorney that you believe you told Mr. Fanzini that you had "some equipment that you needed to be shipped," was that your testimony?

A. Yes.
Q. Did you ever tell him at any time what type of equipment, lawn equipment, fishing equipment, medical equipment?
A. No, I didn't specify what type of equipment it was.

Q. Mr. Mullen, I'm trying to understand this transaction. If this shipment is so valuable, I believe you said it's one of the most valuable pieces of equipment that you're shipping during that time, that it was important to the company, why didn't you send any written documentation, e-mail or otherwise, to Mr. Fanzini telling him the importance, the value, the fact that this was fragile?
A. Well, I had referred to it as equipment. I gave him all the information about who the contact was at Dage, to get more details on what this was before it was picked up. I had felt that since I accepted that quote to move our equipment, that I really didn't have to do anything else because, again, I hired a company that their expertise was moving freight around the country.
Q. But you did not tell him at any time that was an X-ray

machine?
A. No, I never said it was an X-ray machine.
Q. Now, Mr. Mullen, Attorney Cohen touched on this a little bit, but I'd like to flush it out a little bit more. Why did you initially use Logistics Plus to handle various shipments for your company?
A. Because the service was offered to us, as opposed to calling different trucking companies to get quotes to move stuff, it was just easier to call one place that did this for a living.

60

Q. Isn't it true, that it was your understanding that Logistics Plus, among other things, is in the business of getting good prices on shipping, better than what you can get if you called directly?
A. Yes.
Q. So they're in the business of getting you a good deal, correct?
A. That's correct.
Q. Was getting a good deal part of your goal here in

contacting Mr. Fanzini?
A. No.
Q. It wasn't at all?
A. No.
Q. Mr. Carlson testified earlier here that price didn't matter here, notwithstanding the fact we're shipping a $120,000 machine?
A. That's correct.
Q. Would you agree with that?
A. Yes.
Q. And it's your testimony that you didn't get any alternative quotes from Mr. Fanzini, you only got one quote for $590?
A. Yes.
Q. Are you aware that he's testified differently in this case?

A. No.
Q. You haven't reviewed any deposition transcripts in preparation for your testimony?

A. No, I have not.
Q. Mr. Mullen, is it fair to say that one of the other reasons that you decided to use Logistics Plus is that your son-in-law was in fact working there?
A. Yes.
Q. Is it fair to say that you trusted your son-in-law's judgment based on his experience in the shipping industry to handle your freight?
A. Yes, that's correct.
Q. Would you agree that you trusted your son-in-law to take great care and responsibility to use the best efforts to ship your freight?
A. Yes.
Q. Do you think that if Mr. Fanzini knew that he was shipping a fragile $120,000 X-ray machine across the country, do you think that he would have done anything irresponsible to have that shipment shipped?
A. No.
Q. In order for him to do his job, to act responsibly with respect to the freight, would you agree that he has to trust the information that you are giving him?
A. Yes.

Q. Mr. Mullen, do you know anything about Class 50, Class 100, do you know anything about that?
A. No, I don't.
Q. Do you know if that relates to cheap rates or high rates?
A. I couldn't tell you.
Q. Do you know if that relates in any way to how items are handled in terms of whether it's more fragile or not?
A. No, I don't.
Q. As you sit here today, do you now know whether Class 50 is one of the cheapest rates to ship by?
A. From what I heard yesterday, yes.
Q. Knowing what you know now, if you could make the decision today --
MR. DELANEY: Objection, your Honor.
THE COURT: Sustained.
MR. KNOX: I'll withdraw that.
BY MR. KNOX:
Q. Mr. Mullen, you would agree that the word crate, again is listed in your e-mail, that word is used, correct?

A. I do not see the word crate.

Q. See where it says "crate size?"

A. Crate size, okay.

Q. You would agree the word crate is used in that e-mail?

A. Yes.

Q. Do you know if the word crate was used in a document

called bill of lading here?

A. I believe it was.

Q. Do you know if the word crate was on the delivery receipt that you signed that was generated by Central Transport?

A. No, I don't recall without looking at it again.

Q. Do you know if the word pallet or any abbreviation, plt, was used on the delivery receipt?

A. I don't believe it was.

Q. What about any other documents from the rigging company, do you know if the word crate or pallet was used to describe this shipment?

A. Not that I can remember, no.

Q. Did you employ a company by the name of Rog's to handle the unloading of this crate?

A. Yes, we did.

Q. I want to show you a document that's been marked CT-51, is that an invoice from Rog's with respect to the services rendered here unloading the freight in question?

A. Yes, it is.

Q. Was that document kept in Accu-Spec's business records?

A. Yes, it was.

Q. How does Rog's describe the freight in that invoice?

A. Well, they describe it as a crate.

Q. In fact, isn't the date on this invoice three days after the freight was unloaded and opened?

64

A. Yes, it is.

Q. And they're still describing it as a crate?

A. Correct.

Q. They're not describing it as an X-ray machine?

A. No, they didn't.

Q. Do you know if the term crate is commonly used by companies like Rog's or Logistics or Central to describe freight generically?

A. I couldn't tell you.

Q. Mr. Mullen, I believe your testimony is you contacted Logistics Plus to negotiate a good rate on a shipment, is that correct?

A. I contacted them to move the freight for us.

Q. But they don't have any trucks, do they, do you know that?

A. No, they don't have any trucks.

Q. They're not actually moving the freight?

A. No.

Q. They are negotiating the price for you, somebody else is moving the freight, correct?

A. That's correct.

Q. Do you know if Logistics Plus is responsible for the packing of the freight out in California?

A. No, they're not.

Q. Who's responsible for that?

A. The packing would have been done by the company that

owned the equipment we were buying.
Q. Do you know if Logistics Plus is responsible for stamping things on the outside of freight, such as handle with care, fragile, anything like that?
A. No.
Q. Do you know who's responsible for that?
A. That would be the company that was shipping the equipment to us.
Q. And, lastly, do you know if Logistics Plus is responsible for arranging for forklifts and the rigging companies, like Rog's rigging company here, to unload the freight?
A. No.
Q. Who's responsible for that?
A. When it comes to our facility, that would be our responsibility to arrange to have it moved off the truck.
Q. What about elsewhere, if it's out in California or Kansas City or wherever?
A. Well, if it's being picked up where the freight is shipping from, it would be the company who bought the equipment responsibility to get it loaded on to the truck.
Q. I'll ask you a simple question. Is Logistics Plus

located in Erie?

A. Yes, they are.

Q. And this X-ray machine was coming from California,

correct?

A. That's correct.

Q. At any time before this shipment moves from California to McKean, is Logistics Plus inspecting that freight?

A. No, they're not.

Q. Are they handling that freight?

A. No.

Q. Are they touching it in any way?

A. No.

Q. If that's the case, wouldn't you agree that Logistics Plus really has no way of verifying what's in that crate?

MR. DELANEY: Your Honor, I'd like a side bar.

THE COURT: All right.

(At side bar on the record.)

MR. DELANEY: I'm going to object to this line of questioning. The whole purpose of this line of questioning is to suggest to the jury that Logistics Plus has no liability because it has lack of knowledge because it has lack of information. It's clear that is clearly contrary to the Carmack Amendment. The Carmack Amendment doesn't require any specific information pass to the freight forwarder. It doesn't require that there be notice about the freight, what the freight may be. It is virtually strict liability.

MR. KNOX: Part of our defense is saying we are not touching this freight.

67

THE COURT: Your liability is completely independent of whether you touch it or not. Your liability arises as a matter of law, if a prima facie case has been made out. I wouldn't let you argue to the jury in closing, for instance, that you can't be liable because you never touched the freight. I'll sustain the objection.

(End of discussion at side bar.)

BY MR. KNOX:

Q. Mr. Mullen, I'm going to show you another document that's been offered into evidence here. This is a picture of the crate, I believe this is Exhibit 9 -- Mr. Mullen, on that picture are there any symbols stamped on the outside of the crate?

A. Yes, there are.

Q. Is there a wine glass symbol on both sides?

A. Yes.

Q. Do you know what that symbol means?

A. I would say that it would mean it was fragile.

Q. Have you seen the X-ray machine in question here?

A. Yes.

Q. Would you agree that it has a computer screen and other glass components?

A. Yes, it does.

Q. Mr. Mullen, after this freight arrived at Accu-Spec's facility on February 14, 2003, would you agree that you and Mr.

Fanzini were in fact in constant communication about how to deal with this situation?

A. Yes, we were.

Q. In fact, did you even share e-mails about this situation

for months on end?
A. Yeah, they were trying to help us throughout to get this settled with Central Transport.
Q. Would you agree that the initial formal claim was made against Central Transport and not against Logistics Plus?
A. The initial claim was made against Central Transport, yes.
Q. Are you still doing business with Logistics Plus?
A. No.
Q. You're sure about that?
A. Yes.
Q. Were you doing business after this freight was dropped off in February of 2003 with Logistics Plus?
A. Yes.
Q. Were you in fact even doing business with Logistics Plus after this lawsuit was filed in the winter of 2004 -- I'm sorry, winter of 2003?
A. Yes.
Q. Do you know anything about forklifts?
A. I know that they have weight restrictions and they have different sizes for moving different sizes of freight.

Q. Do you know if forklifts are rated at pound limits?
A. Yes, they are.
Q. Are there forklifts rated for 5,000 pounds?
A. Yes, I would believe so.
Q. Are there forklifts rated at 10,000 pounds?
A. I would believe so, yes.
Q. Do you at Accu-Spec or do you engage a contractor for Accu-Spec that uses 10,000 pound forklifts?
A. We did in the case of this X-ray machine, yes.
Q. When was that used?
A. The forklift was used to remove the crate that the X-ray machine was in from the back of the truck.
Q. Are you aware of any letter or marking on the outside of this crate that talks about the need for the use of a 10,000 pound forklift?
A. No, I don't recall that.
Q. Do you recall seeing a letter on the outside of this crate at all generated by Dage?
A. (No audible response.)
Q. I'm going to show you a picture here --

A. Yes, okay.

Q. Again, this picture is Exhibit 9, do you see this?

A. Yep.

Q. It's kind of hard to see it over here, (indicating), were there letters put on the outside of the crate?

A. Yes, there were.

Q. Do you know what those letters said?

A. No, I don't.

MR. KNOX: Your Honor, the picture didn't come out too well, may I show the jury?

THE COURT: Yes.

(Whereupon, Plaintiff's Exhibit 9 was published to the Jury.)

BY MR. KNOX:

Q. Just so you can see that, too, Mr. Mullen, do you see the two letters there?

A. Yes, I do, thank you.

MR. KNOX: I have nothing further.

THE COURT: Any further redirect of Mr. Mullen?

MR. DELANEY: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. DELANEY:

Q. I may have asked you this, Mr. Mullen, when you were in the parking lot at Accu-Spec on February 14th, did you see the forklift remove the crate from the truck, from the Central Transport truck?

A. Yes, I did.

Q. Did you see anything about that operation that would have caused the damage that you observed and we looked at in the pictures?

71

A. No, I did not, those guys were very careful.

MR. DELANEY: Thank you, that's all I have.

THE COURT: Anything further by way of recross?

MR. COHEN: No, thank you, your Honor.

THE COURT: Thank you, Mr. Mullen, you're excused. Call your next witness.

MR. DELANEY: Your Honor, the next piece of evidence I'm going to put in is really a document and it has been marked as Exhibit 25. And this is the bill of lading signed by the Central Transport trucker on February 5, 2003, in California.

THE COURT: Is that Plaintiff's 25?

MR. DELANEY: It is Plaintiff's No. 25.

THE COURT: It's admitted.

MR. DELANEY: May I publish it to the jury?

THE COURT: You may.

MR. DELANEY: And just to slide it up, your Honor, there is a Central Transport emblem on the lower left-hand side and the signature is that of the Central Transport trucker. I'm introducing this to show the absence of any notation of damage.

MR. COHEN: Your Honor, I object to testimony from the attorney regarding that exhibit. He can introduce it into the record, however, testimony without a witness I'd object to.

MR. DELANEY: I'll refrain and wait for closing.

THE COURT: All right.

72

MR. DELANEY: Thank you, your Honor. Your Honor, the next witness we have is Mr. Fisher, who is in Austin, Texas.

THE COURT: When is he available?

MR. DELANEY: He's available at one o'clock. Frankly, he has to go from this job site to the studio where he's going to be, so it might be 1:10.

THE COURT: I've moved my sentencing to 1:30. So I hope it's closer to 1 o'clock.

MR. DELANEY: We'll try to do that.

THE COURT: If he could get there by one, that would be helpful. Is there a deposition transcript that is going to be read into the record in this case?

MR. DELANEY: No.

THE COURT: So what you're telling me right now is you don't have any witnesses to fill up any time between now and one o'clock, is that correct?

MR. DELANEY: That's correct, your Honor. Mr. Fisher is the last evidence that we'll introduce.

THE COURT: Let me see you at side bar.

(At side bar on the record.)

THE COURT: It's 11:10. There's two things we can do. Just send this jury away to 1 o'clock or start your case

out of turn, which I'm inclined to do. Do you have folks you
can start with?

MR. COHEN: Yes, I do.
THE COURT: Let's do that.
(End of discussion at side bar.)
THE COURT: Members of the jury, so we just don't
have down time, unnecessary down time, even though Mr. Delaney
hasn't quite finished his case, because he has one more witness
that, as you heard, needs to be called, we're going to switch
over and permit the defendants to start or at least one
defendant to start calling a witness or witnesses just to keep
things moving. So, Mr. Cohen, go ahead.
MR. COHEN: Thank you, your Honor. Central
Transport calls George Horetsky.
THE COURT: Would you spell your name for my court
reporter, please?
THE WITNESS: H-o-r-e-t-s-k-y.
GEORGE HORETSKY, CENTRAL TRANSPORT WITNESS, SWORN
DIRECT EXAMINATION

BY MR. COHEN:
Q. Good morning, Mr. Horetsky.
A. Good morning.
Q. Could you please state your name and your work address for the record?
A. George Horetsky, our terminal is at Holland Street in Falconer, New York.
Q. And if you could tell me what your job title is and where

you work?
A. I'm an account executive, I work out of the Jamestown terminal.
Q. What is the name of the company?
A. Central Transport International.
Q. How long have you worked for Central Transport?
A. Fourteen-and-a-half years.
Q. If you could describe for the jury your background, your work at Central Transport over those 14 years?
A. Over the 14 years I've worked in various positions, including sales, operations, I was the terminal manager. I was

also an internal auditor for the company for two years. I'm currently an account executive, salesman.

Q. As an account executive, describe for the jury what your duties are, what do you do?

A. Primarily I negotiate contracts with local customers. Try to set up programs to help them meet their transportation needs, through pricing, services that we offer. Explain the lanes that we service, how we can benefit them and help them meet their transportation needs.

Q. Was Logistics Plus one of your customers?

A. Yes, they were what I would consider a partner.

Q. When you say a partner, what type of business does Logistics Plus perform briefly, the jury's heard some?

A. They would be a third-party logistics company or freight

75

forwarder. They would basically be a middleman for accounts.

Q. And would you consider them a sophisticated player in the logistics field?

A. Yes, I would, very successful.

Q. How long has Logistics Plus been a customer of yours?

A. For Central Transport, I would say at least eight years. For myself, calling on the account, roughly three years.
Q. How many times has Central Transport moved freight for Logistics Plus?
A. Throughout the company numerous -- I'm sure thousands of times we have moved freight.
Q. Did Logistics Plus and Central Transport have an arrangement with respect to pricing for the transportation of freight?
A. As we do with most of our accounts, we had a negotiated discount program in place for Logistics Plus.
Q. When you say discount program, if you could briefly and generally explain to the jury what you mean?
A. We have base rates and tariff rates that we work off of. Where we basically come up with the rates that we charge customers. Certain customers because of the volume they can do, they can bring to the table for us, we allow more of discount percentages. So we have, basically, a discount program in place with them.
Q. Is that a discount based on the classification of the

freight?
A. Class would come into play on shipments, yes, it would.
Q. Now, what I'd like you to explain to the jury is in general, when a customer calls to move freight, what are the options you have as far as how to ship that freight for an established customer like Logistics Plus?
A. Well, many customers can go right to our Web site and they know the discounts, so they can pull it right off of there. If a customer calls, we will basically go to our rate department, give them the required information that we need to know to properly rate the shipment. Our rate department will already have their discount programs available so they can come up with the rates and we would communicate that to the customer. So they could call to get the rate, they could go online and get the rate or e-mail. There are various ways they could contact us to get what the rate would be.
Q. For a customer such as Logistics Plus that you have a relationship with, what are the types or kinds of rates that you could quote?
A. We offer a number of different rates, everything from actual class discount rates to spot rates, where we would look

at various lanes that we're moving freight in. If we need more freight in that lane, we might be able to give them even more of a discount that they could capitalize on. That would be true for any customer.

Q. You're using a lot of trucker talk lingo, I want to slow it down a little bit and break this up. Let's talk about spot pricing for a second?
A. Okay.
Q. What information do you need from the shipper or in this case the freight forwarder, Logistics Plus, in order to give them a spot price?
A. Spot pricing, we're basically selling the space on a trailer moving from point A to point B. So what would be required would be the origin zip code, destination zip code. The weight of the shipment and generally how much room it's going to take up on the trailer. We use usually will get linear foot.
Q. Now, if you were going to give a rate based on an established customer's discount program, what information do

you need for that quotation?
A. The origin zip code, the destination zip code, the weight, and then we would ask for the class of the freight.
Q. Now, there's going to be other testimony in more detail about the class of the freight, if you could in general describe to the jury what do you mean by the class of the freight?
A. Class of the freight is basically set forth by the National Motor Freight Organization. We utilize a classification guide where pretty much anything and everything

that could possibly be shipped is given a class. In general, lower density, lower value freight is Class 50. Higher value, less dense freight would be a higher class.
Q. Okay. Now, with respect to rating, do you have to call somewhere internally to get a rate or do you have a book there that you look at?
A. I call the rate department to get the rate.
Q. Now, we've been talking generally about how this works when a shipper calls up and wants to move freight, described

two different ways. I'd like to now focus on what happened in this case. And if you could describe specifically, these details are important for the jury, what your first contact was with Logistics Plus with respect to the shipment of the freight which is the subject of this litigation?

A. I received a call from Mr. Chris Fanzini, who indicated that he would like to get a freight rate.

Q. Let me slow it down. He called and asked for a freight rate, what did he say in that telephone call?

A. He said, George, I would like to get a freight rate, I'm looking to move freight from California to McKean, Pennsylvania.

Q. What else did he say?

A. At that time, other than relating the information, that was the gist of the conversation.

Q. He told you the origin, he told you the destination, did

he tell you the weight and dimensions?

A. He gave me the weight, I did ask the class, he did not have the class. Therefore, I suggested a spot rate.

Q. Okay. Slow it down again one second here. You got the origin, you got the destination, you asked for class weight, he didn't know it?
A. That is correct.
Q. Did you go with a spot quote at that point because you could get one without the class?
A. That is correct.
Q. After you hung up the phone with Mr. Fanzini, what did you do with respect to this?
A. I telephoned the rate department, relayed the information as it was given to me by Chris, to secure the rate. The rate was given to me, I called Mr. Fanzini back and relayed what the rate would be.
Q. From the time Mr. Fanzini called you to ask for the rate, to the time you called him with the rate, what amount of time transpired?
A. I would say 5, 10 minutes, tops.
Q. When you relayed the rate to Mr. Fanzini, what did he say to you on the telephone on that call?
A. He basically thanked me for getting the rate, wasn't quite sure how the rates stacked up to the competition, but he

would get back to me.

Q. What was the next communication you had with Mr. Fanzini with respect to this shipment?
A. He called me back, and at that particular time he did indicate that there was some doubts they could move the freight at the level he was quoted, that he would like to get another rate.
Q. All right. How long after that last call where you gave him the rate, was the next call where he called up and asked for a lower rate?
A. I would say somewhere between -- 45 minutes to an hour.
Q. This all happened the same day?
A. Oh, yeah.
Q. What specifically did you say to him when he said he wanted a lower rate?
A. Again, I asked for more specifics as to the nature of the freight. He was really unaware of what the freight was.
Q. What else did you say to him or ask him?
A. At that time if he knew what the class was.

Q. What did he specifically say to you?
A. That he was uncertain of the class, he would like me to obtain a Class 50 rating.
Q. So did you do that?
A. I did that.
Q. All right. Now, with respect to what you do after he told you to get a Class 50 rate?

A. Could you say that again, I'm sorry.
Q. After he told you could you get me a class 50 Rate, what did you do?
A. I called the rate department, obtained a Class 50 rate, called Chris back and relayed that information to him.
Q. Did you have any other communication with Mr. Fanzini with respect to this transaction before the shipment was actually moved?
A. Several days after he did call and the freight was actually in transit.
Q. In transit -- I'm going back before it was in transit, any other communication?

A. No.
Q. Did Mr. Fanzini ever call to tell you, you know, it's not rate 50, it's rate 100?
A. No, sir.
Q. Or Class 100?
A. No, he did not.
Q. Physically, how does Chris Fanzini at Logistics Plus get this freight moving, what does he do have to do, paperwork, for instance?
A. I could not really speak to that, I'm not certain. But the general action they would take is contact the shipper, provide a bill of lading to the shipper and have the shipper contact the carrier for pick up.

82

Q. Okay. So it is common that Logistics Plus, the freight forwarder, prepares and provides the bill of lading, correct?
A. That's correct.
Q. I'm going to show you an exhibit to look at for a moment. In your book, George, it's Exhibit CT-1, the exhibit is a little blurry it was faxed a couple times, I apologize for how

it looks. George, on the top that says Logistics Plus, correct?
A. That's correct.
Q. Is this Logistics Plus bill of lading?
A. That is a Logistics Plus bill of lading, that's correct.
Q. Did Logistics Plus prepare this bill of lading?
A. Yes, they did.
Q. Would that be Chris Fanzini who prepared the bill of lading?
A. To the best of my knowledge.
Q. What class is provided on the bill of lading?
A. The bill of lading indicates Class 50.
Q. How is the freight described in there where it says description and identification of articles?
A. The description crate. No further information provided.
Q. And a weight is provided, correct?
A. That's correct. It looks to be 5280.
Q. Now, is a Class 50 rate the absolute rock bottom rate a trucking company can quote?

A. In general terms it would be, yes.
Q. The classifications, what do they go from, 50 to what?
A. Five hundred.
Q. When you quoted the rate the second time to Mr. Fanzini, did you rely on the information provided by Mr. Fanzini, that the freight was Class 50, in deciding whether or not Central would enter into an agreement to ship that freight at that rate?
A. I was simply providing a rate at the Class 50 rate, as he asked me to do.
Q. Did you rely on Chris Fanzini's information to make that decision?
A. Yes, I did.
Q. Did you have any reason at that time to believe that the class provided by Mr. Fanzini was incorrect?
A. No reason to believe that.
Q. Was the crate, that we now today know was an X-ray machine, properly classed at Class 50?
A. No, it was not.
Q. What class should it have been classed at?
A. The X-ray machine in question should have been rated at Class 100.

Q. Had you known that the X-ray machine was a Class 100 piece of freight, would you have agreed to ship this freight for the rate that you quoted?

A. We would never agree to haul freight at a class different than what the actual freight is.
Q. Were you sitting here for the opening statement provided by counsel for the plaintiff?
A. Yes, I was.
Q. In that opening testimony he testified or he didn't testify, he expressed that testimony will be elicited from Mr. Fanzini. And that Mr. Fanzini is going to say that he in fact didn't tell you Class 50, but instead that you told him to move this at Class 50 to get a lower rate; did you hear that?
A. I'm aware that he said that.
Q. That the attorney said that?
A. That's correct.
Q. Did that upset you when you heard that?
A. Sure, I was disappointed.
MR. DELANEY: I would object, your Honor, which

attorney is he talking about, I'm unclear?

MR. COHEN: During the opening, I believe -- either, it doesn't matter, it's either attorney.

MR. DELANEY: You were suggesting that somebody misrepresented something, I didn't speak about Mr. Fanzini at all. If he's referring to me, I object.

THE COURT: I guess for my benefit because I didn't hear -- now you want a clarification.

MR. KNOX: I will acknowledge, as merely a

representation, as to what Mr. Fanzini testified to.

THE COURT: Let's do this, let's roll the tape all the way back and start forward again.

BY MR. COHEN:

Q. Sure. All right, we'll make sure it's clear where the information is coming from. During Mr. Knox's opening, the attorney for Logistics Plus, he indicated that testimony will come from Mr. Fanzini in this trial that he didn't provide or ask for a Class 50, but instead you told him to make it Class 50. After hearing that, did that upset you?

A. As I said, it's disappointing because the fact of the matter is that he basically said I need a Class 50 rating because he was unaware at that particular time to me he was just quoting the freight, quoting a shipment.

Q. Let me ask you this just pointblank. Did you ever tell Mr. Fanzini let's get it dumped down or reduce it to Class 50 because we could get you a lower freight rate?

A. No, I did not.

Q. Is your memory on this pretty clear?

A. Pretty clear, sure.

Q. Would you ever agree to misrepresent the classification of freight so your company would make less money?

A. I would never agree to do that. I need to base my decisions on what is being given, the information that is being given to me.

86

Q. I'd like to talk and move into a different topic for a moment. There's testimony that you were called at a certain point after the delivery of the freight to go to Accu-Spec; did you go to Accu-Spec to look at the freight?

A. Yes, I did.

Q. All right. Was that the day it was delivered?

A. It was the day it was delivered, I would say like approximately a half-hour after delivery was made.

Q. Let me back up for a second as well. You've been doing this 14 years, correct?

A. Yes, I have.

Q. How many times have you seen packaging of large freight like this?

A. Many times over my career.

Q. And when you came and looked at that X-ray machine, what you then found out was an X-ray machine in that crate, was the crate opened?

A. They had some of the screws unscrewed, but the crate was not opened.

Q. Did you ever have an opportunity to look at the crate when it was opened?

A. I could visually see the machine slightly by peering through the opening that they had made by loosening the screws.

Q. Was it enough to get a good idea what it looked like in there?

A. Very limited.

Q. Based on your experience, looking at the crate from the outside and what you could see from the inside, was this thing packaged properly for a 5,280 pound machine?

A. Based on my experience, no.

Q. Explain to the jury, based on your experience, why you think the two-ton machine was not packaged properly?

A. Well, it would be common practice in electronics and electronic equipment, to have some kind of a foam padding or specifically made custom foam packaging supporting the electronics, the valuable parts of the machinery. As is done with small packaging such as the case, obviously, in large packaging.

Q. Are we talking about those corners, sometimes very hard foam that you see on items --

A. Sure, injection foam. Possibly styrofoam pieces. Obviously, some companies go a little beyond other companies. But almost in all cases there's some steps taken to protect the electronic material.

Q. Describe for the jury the difference between external packaging and internal packaging?
A. External packaging would be the crate itself. The structural integrity of the crate and allowing the crate or whatever the package to be properly maneuvered and handled by a forklift or a pallet jack. The inside packaging, again, would

be a piece of styrofoam or foam, air bags, any type of packing that would keep heavy equipment from shifting around or fragile equipment to sustain bouncing that occurs when they're heading down the road.
Q. Okay. We're looking at Exhibit 13 again. In the case of this very heavy machine, wouldn't it be reasonable, in fact, required and prudent to have wood bracing supporting the upper part of this very heavy machine from the outside walls?
A. That would definitely be expected that some sort of packaging of that sort would be there.
Q. How about some wood beams protecting and holding in place in the center of the crate the mid portion of this very heavy machine?

A. That is a very common practice and was not apparent in this particular shipment.

Q. You see this void here -- should that have been filled with some sort of bracing, void filler material to keep the product from moving?

A. With my experience, I would say certainly there should have been some type of protective lining between the crate and that piece of shelving.

Q. Was it unreasonable to have the flange of the shelf pressed against the frame of that crate without protection to keep it secured?

A. A machine of this nature and value, it is very uncommon.

89

Q. It's uncommon not to have that protection?

A. Uncommon not to have the protection there, that's correct.

Q. This is Exhibit 9. This is the outside of the crate. This machine weighed 5,280 pounds. Would it have been reasonable or prudent to have a cross member on the crate in a diagonal fashion to give additional rigidity?

A. Most crates of that size you would find that type of protective packaging to protect the integrity of the crate. And to keep the crate from wobbling in transit.
Q. Back to Exhibit 13. Based on your experience, have you come to a conclusion as to the cause of the damage to the X-ray machine in this crate by looking at the pictures and from your personnel observations at the date you went to evaluate it?
A. My initial observation to me indicated that because of the heaviness of the machine, that it slightly shifted in the crate.
Q. Did it shift in the crate due to poor packaging?
A. Insufficient packaging and not being properly secured.
Q. With respect to this shipment, were you told that it was used equipment?
A. No, sir.
Q. Did Logistics Plus ask you for a copy of the Central Transport tariff?
A. No, sir, they did not.

90

Q. The bill of lading that I showed you earlier, the one

prepared by Logistics Plus, does that incorporate the carrier's tariff?
A. The wording in their bill of lading does incorporate Central Transport's tariff.
MR. COHEN: There is no way to read the language, it will be done at a later time, your Honor, it's too blurry on the copy.
BY MR. COHEN:
Q. And does the Central Transport tariff contain limitations of liability?
A. Yes, it does.
Q. For used equipment is the limitation of liability 10 cents per pound?
A. It's not my area of expertise, but that is my understanding.
MR. COHEN: Mr. Horetsky, thank you very much, I have no further questions at this time.
THE COURT: All right, Mr. Knox.
CROSS-EXAMINATION
BY MR. KNOX:
Q. Good morning, Mr. Horetsky.
A. Good morning.

Q. Mr. Horetsky, you testified that you dealt with Mr. Fanzini of Logistics Plus in pricing this shipment, correct?

A. That's correct.
Q. You stated that you were essentially giving a spot quote for Logistics Plus, correct?
A. Initially, that's what we looked at was a spot rate, that's correct.
Q. In making that quote, did Mr. Fanzini provide you with all the necessary information?
A. For the spot rate the information required was provided, that's correct.
Q. What is the other rate?
A. That is the class discounted rate.
Q. Did he give you the class for that rate?
A. On the second rate Class 50, yes, sir.
Q. What was the first rate, by the way?
A. I would -- venture a guess, a couple hundred dollars more than the second rate. But --
Q. The second rate was $590, I believe?

A. It may have been a little bit less than, $525, somewhere around there.

Q. So the difference isn't really that great?

A. Not significant in the big scheme of things.

Q. Did Mr. Fanzini ever specifically -- strike that. Did you ever specifically ask Mr. Fanzini not what the class was, but what exactly this freight was?

A. Yes, I did.

92

Q. Did he ever supply that to you?

A. He was unaware of what the freight was.

Q. If a third-party logistics carrier, like Logistics Plus, for whatever reason does not give you that information, is that a deal breaker, does that prevent you from entering into the transaction?

A. We're trusting that the information that we received, that they are knowledgeable of that. We are providing the rate structure based on the information we are receiving.

Q. Sure. What if the information they give you is merely one crate, one pallet, one skid, is that sufficient enough

information for you, as a carrier, to go forward with the
transaction?
A. Many times it is, yes.
Q. In fact, it's commonly done, I believe you stated in your
deposition that's commonly done when you're dealing with a
third-party logistics --
A. That's correct. A third party may call and say I have a
pallet and, you know, get into the specifics of what the item
is.
Q. I believe you testified that when you were talking to Mr.
Fanzini, he initially was uncertain of the class, is that
correct?
A. That's correct.
Q. And he asked you to get a Class 50 rate, is that your

93

testimony?
A. That's correct?
Q. And you gave it to him, correct?
A. Correct.
Q. You gave that to him even though he was uncertain of the

class?
A. That's correct. Again, I was providing the rate based on the fact he was getting freight rates.
Q. And did you ultimately in fact agree to ship it at Class 50?
A. I provided a freight rate and really had no involvement after providing the freight rate.
Q. Perhaps I should ask you, you did provide a freight rate based on Class 50?
A. Based on the request for a Class 50 rate, that's correct.
Q. Did you ever do anything to confirm the fact this was Class 50?
A. Well, again, we would base at time of pick up on the bill of lading, making sure that any shipper or third party is truthful with what's on the bill of lading or truly represents what is actually being handled.
Q. Mr. Horetsky, are you familiar with a document labeled OS&D manual?
THE COURT: OS what?
MR. KNOX: OS&D.

THE WITNESS: OS&D stands for over shortage and damaged.

BY MR. KNOX:

Q. I want to put up on the screen here a document that was produced in discovery by Central Transport marked CT-0080, we'll mark it as Logistics Plus Exhibit 1. Mr. Horetsky, what is that?

A. It looks like a cover sheet for a manual dealing with over shortages and damages compiled by various members of our home office.

Q. Is that a Central Transport document?

A. Appears to be, yes.

Q. Do you consult the OS&D manual in carrying out your duties?

A. In sales my contact with that would be very limited, that is more of an operational aspect.

Q. Have you ever looked at the OS&D?

A. Throughout my career I have looked at the OS&D manual, that's correct.

THE COURT: Let me see counsel at side bar.

(At side bar on the record.)

THE COURT: I'm going to break, I thought about having the jury start at about a quarter to one. How much longer do you have with this guy?

MR. KNOX: Not much longer.

THE COURT: How about you?

MR. DELANEY: Fair amount.

THE COURT: We'll probably have to interrupt him to get to this other guy.

(End of discussion at side bar.)

THE COURT: Members of the jury, we're going to take a break now. I'm going to ask you to be back here at a quarter to one. And we're going to get as far as we can with this witness, then break for the guy who's coming in by video conferencing, then we'll get this fellow back on. So we got a lot going on. All right, we're in recess

(Luncheon recess from 11:52 a.m.; until 12:50 p.m.)

THE COURT: All right, you may continue, Mr. Knox.

(Continued) - CROSS-EXAMINATION

BY MR. KNOX:

Q. Good afternoon, Mr. Horetsky.

A. Good afternoon.

Q. Before the break I think we were talking a little bit about common usages of terms like crate, skid that were used in the industry. You acknowledged that is in fact commonly used, I believe, is that correct?

A. That's correct.

Q. I believe I directed your attention to what is known as the OS&D manual from Central Transport, Central Transport's document. And you acknowledge that is a Central Transport

document, is that correct?

A. That's correct.

Q. If I could direct your attention to page CT0083, do you see under paragraph 3-A there, can you see that?

A. Yes, I do.

Q. Would you agree that paragraph is saying that at some point bundles should be called bundles, skids should be called skids, drums, crates, racks, etc., do you see that?

A. Yes, I do.
Q. Would you agree with that -- that is in fact the policy of Central Transport?
A. In regards to the shipper's responsibility to do that.
MR. KNOX: I'd like to move for the admission of Logistics Plus Exhibit No. 1.
THE COURT: It's admitted.
BY MR. KNOX:
Q. And again on this point, Mr. Horetsky, do you have an opinion as to whether or not such a description, one pallet or one crate, is that sufficient information to give to the truck driver when picking up that crate to know what in fact they're getting?
A. Obviously, more information will be desirable.
Q. If a truck driver, such as the one in this case, Grminder Shing from Central Transport goes to California, goes to the Dage facility and sees that what he is picking up is one crate,

97

if the truck driver has a problem with that, at that point does the truck driver say I'm not picking up this item of freight

because it's different than what's on the bill of lading?
A. I'm sure different drivers would react differently. I'm not a driver, I really couldn't speak to that. There probably are other people that would be better suited to answer that.
Q. Do you know if it's Central Transport's policy if a truck driver confronts a piece of freight and all it says is one crate, that truck driver is then supposed to call somebody and say hey, what is this, what's in this crate?
A. As to the specific policy of what they're instructed to do, I cannot speak to that. I would think that we would want to get as much information as possible. What they would actually do in this situation I'm not sure what the protocol would be.
Q. Well, whatever the policy may be, the truck driver in this case did in fact pick up the freight?
A. He did pick up the freight.
Q. He signed the bill of lading saying one crate, correct?
A. That's correct.
Q. Mr. Horetsky, the use of class designations on shipments, don't you agree that whether something is Class 50 or Class 100, that these really correspond to weight and density in terms of factoring in price?

A. It would also correlate to liability issues.

Q. What do you mean by that?
A. Well, class of freight, also, is a derivative of the density of the freight. But also the value of the freight. So a lower class freight would be dense, generally low value material. Or higher class rate freight would be less density freight, but also other higher value freight. That would be reflected in the liability that we take on when we accept that freight at the time of pick up.
Q. Is that always the case, when something is Class 100, does that always mean it's more valuable than Class 85, Class 50?
A. I'm not an expert in that area, I would say generally higher class is more expensive. But, again, I'm not an expert in that area, so I couldn't speak to that for sure.
Q. Do these class designations tell anybody anything else about the freight?
A. Just the basic characteristic of the freight, nothing in detail as to what the freight is or what might be moved.

Q. Does Class 50 or Class 100 communicate to a truck driver or a forklift driver or anybody that this is freight that is fragile or susceptible to breaking very easily?
A. A generally higher class freight will be a little more susceptible. But as a carrier, we're looking to handle any piece of freight in a proper fashion.
Q. But does Class 100, does that specifically say to a truck

driver or a forklift driver, this is a fragile item and needs to be handled with care?
A. In and of itself, no, it does not.
Q. Are you aware, Mr. Horetsky, that generally there is an allegation by Accu-Spec in this case that Logistics Plus misclassified the freight?
A. Just through the testimony.
Q. You are generally aware of that, though, is that correct?
A. Yes.
Q. Do you think that this freight was in fact misclassified?
A. Knowing what the crate is at this point, I would say yes, it was misclassified.

Q. In order to classify something, would you agree you obviously need to know what it is?

A. I would agree with that statement, yes.

Q. If somebody just told you it's a crate, does that hamper anyone's ability to classify the freight?

A. Certainly.

Q. Let's assume for the sake of argument that this was misclassified, it should have been Class 100 versus Class 50. Even if that is the case, does that misclassification play any large role in causing damage to this freight?

A. No. As I stated earlier, as a carrier, we would want to be responsible for any piece of freight, regardless of the class and handle it in a proper fashion.

Q. But the misclassification, that doesn't play any role in damage, is that correct?

A. In mishandling or damage the freight, no.

Q. Mr. Horetsky, is it your testimony that there were definitely two quotes given here to Mr. Fanzini?

A. Yes.

Q. An initial spot quote, I believe your testimony was that it was few hundred dollars or so more --
A. My best recollection would be a couple hundred dollars more than the Class 50 rate.
Q. But then there was another quote, another rate given, correct?
A. That's correct.
Q. Did you get the sense in your conversations with Mr. Fanzini that Accu-Spec, they simply wanted a better deal than the first quote?
A. Sure.
THE COURT: Mr. Knox, let's cut this off, this call should be coming in. Do you want to step down, Mr. Horetsky.
THE WITNESS: Sure.
MR. KNOX: For whatever it's worth, your Honor, I have maybe five or ten minutes at the most left.
THE COURT: All right. Members of the jury, let me just tell you that, if this was going to be deposition testimony I would tell you the same thing. The mere fact this

is coming in by way of video conferencing, you should not treat it any differently than any other kind of testimony, as if you saw the person seated right up here on the stand. The only difference is one is coming over TV, the other witnesses you are, of course, seeing live. When the call comes in, let us know.

(Recess from 1:03 p.m.; until 1:07 p.m.)

MR. DELANEY: Mr. Fisher, can you hear me?

THE WITNESS: Yeah.

MR. DELANEY: I think either the judge or one of his staff persons is going to swear you in.

THE COURT: I'll do it right now. Raise your right hand.

JOSEPH FISHER, PLAINTIFF'S WITNESS, SWORN

(Testifying by Video Conference)

DIRECT EXAMINATION

BY MR. DELANEY:

Q. Mr. Fisher, we have a limited window of time, so I'm going to try to be quick. Will you tell us your name, your address and your occupation?

A. My name is Joseph Fisher, my address is 857 Sistiview

Lane in Manteca, California. And my position at Dage is I'm the service manager for North America, South America.

Q. How long have you been employed by Dage?

A. Almost 10 years.

Q. And where is Dage headquartered?

A. In Aylesbury, England.

Q. And what is the business of Dage?

A. We manufacture X-ray inspection equipment and bond test equipment, which is used in the semiconductor and particle circuit board industry.

Q. We have heard reference to a piece of X-ray equipment that was bought by Accu-Spec Electronic Services, Inc., of McKean, Erie County, Pennsylvania, in this case. And that the equipment was shipped from Fremont, California, in February of 2003. Does Dage have a facility in Fremont, California?

A. Yeah, we have a sales and service division in Fremont, California, which covers North America and South America.

Q. Were you involved at all in the sale and/or the shipment or preparing for shipment of the Dage model XL6500 X-ray unit that was purchased by Accu-Spec Electronic Services, Inc.?

A. Yes.

Q. Do you know what the history of this machine was prior to its sale to Accu-Spec?

A. Yes.

Q. And can you tell us what that was -- do you know how old the machine was?

A. The machine shipped from England in September of 2002, shipped directly to Rosemont, Illinois, for a trade show. It was at a trade show for three days, and then it was shipped to

103

our Fremont, California facility, and it was set up in our demo room from the time it arrived, which is probably sometime in September, until it shipped out to Accu-Spec in February of '03.

Q. All right. During the course of the machine being at the Rosemont, Illinois trade show, do you know if the machine was put in operation at all?

A. Yes, it was set up. We did some demonstrations on it over the course of the show, which is three days long.

Q. And while it was at the facility in Fremont, California, was the machine available to demonstrate its use to potential customers?
A. Yes.
Q. Do you know is there an actual record kept of the amount of use of the machine from the time it's shipped from England until it's sent to Accu-Spec in February of 2003?
A. There is a counter on the machine itself for the hours -- but there is no record other than that.
Q. Do you know what the amount of use was prior to its shipment in February of 2003?
A. I don't have an exact number, I can give you an estimated number.
Q. Would you give us that estimate, please?
A. I would say probably had no more than 20 hours, X-ray hours on it.

104

Q. A machine like this, do you have an understanding of what its anticipated or expected life would be?
A. I would anticipate this machine could be used for

decades.
Q. In terms of useful hours or hours of use, do you have any estimate of what that would be expected, hours of use?
A. Typically, our customers would use it about 600 hours a year. You can multiply that by 20 years or 30 years or whatever.
Q. All right. Was it typical in 2002 and 2003 for your facility in Fremont, California, to have a machine available, an X-ray machine available on site?
A. Yes.
Q. Would those machines periodically be shipped to other locations in the United States in order to attend trade shows?
A. Yes.
Q. Were you the person who would oversee or were you the person who would assign people to undertake the shipping of these various X-ray machines around the country?
A. Yes.
Q. All right. In 2003 when this particular unit was shipped to Accu-Spec, were you involved in any way in preparing for the shipment?
A. Yes, I wasn't in the office the day it was shipped, but I did give the technician an overview of what he needed to do to

prepare it for shipment.
Q. When these machines come in from the United Kingdom, how are they contained or how are they shipped?
A. It's in a wooden crate, the machine is placed on the base of the crate, and then there's wood blocks all the way around the perimeter of the base of the machine, which is used to secure it so it doesn't move in shipment. And then we basically just put the sides on and put the top on -- and all of the sides are held together by lag bolts or carriage bolts.
Q. Are there movable parts when this equipment is in place and in operation, are there movable parts to it?
A. There shouldn't be, no. Everything is secured down for shipment. We have shipping brackets that we will connect to the machine to keep everything from moving in shipment.
Q. Well, my question was once it's out of the crate and it's in Accu-Spec's plant, are there movable parts to the equipment then?
A. Yes.
Q. And my question was going to be how do you secure those

movable parts for shipment purposes?

A. Yeah, we have metal brackets that we use to secure all of the movable stages to the frame of the machine.

Q. Okay. Now, you say that you were not present on the day that this piece of equipment was shipped from Fremont, California?

106

A. No.

Q. Did you assign someone to oversee the shipping?

A. Yes.

Q. And do you remember the name of that person or have you investigated the name of that person?

A. I believe the person was Hoi Tren at that particular time.

Q. Was he a Dage employee?

A. Yes.

Q. Were there any other employees of Dage that you're aware of who witnessed the crating and shipping of this particular machine?

A. Nobody witnessed the actual crating of it, other than the technician. Our receptionist did observe the system being loaded on the truck. She was out there when it was being loaded on the truck.

Q. The crate that was used to ship this piece of equipment from California to Pennsylvania, was it a new crate or was it a crate that was used to ship from England to Illinois to California?

A. The same crate that the machine originally came in from England.

Q. All right. After this piece of equipment was shipped on February 5, 2003, did you speak with the technician who witnessed the crating and the loading of this equipment onto a

truck?

A. Yes.

Q. If there had been damage in the process of crating or loading onto the truck, what would have been the responsibility of that technician in terms of reporting?

A. He would have gave me a damage report and at that point we would have -- if the person that loaded the machine had damaged it, we would have tried to get reimbursement cost of it from that company. But there was no damage report that was filed.

MR. COHEN: Your Honor, I object as to the hypothetical --

THE COURT: I'm sorry?

MR. COHEN: My first objection is based on the question is a hypothetical.

THE COURT: It's overruled. What was the second objection?

MR. COHEN: The second basis was that it elicits hearsay.

THE COURT: Overruled.

BY MR. DELANEY:

Q. When you interviewed the technician, did the technician provide any report of damage for the shipment --

A. No.

THE COURT: Wait until he finishes his question.

108

Start that all over again, please.

BY MR. DELANEY:

Q. When you interviewed the technician, Mr. Fisher, following the shipment of February 5, 2003 to Accu-Spec, did you receive any report from the technician verbally that there had been any incident damaging the equipment?

A. No.

Q. Did you receive any report, written report from the technician indicating that there had been any damage to the equipment in crating or loading the equipment onto the truck on February 5, 2003?

A. No.

Q. Did you speak with the receptionist who witnessed the loading of the crate onto the truck?

A. Yes.

Q. Did she report any incident of damage or observation of damage in the loading of the equipment onto the truck on February 5, 2003?

MR. COHEN: Objection, hearsay.

THE COURT: Let me see you at side bar.

(At side bar on the record.)

MR. COHEN: Your Honor, the objection is hearsay.

MR. KNOX: I would join in that objection.

THE COURT: Why isn't it hearsay?

MR. DELANEY: The rules of evidence talk about in

the absence of a report, something other than hearsay.

THE COURT: It's an exception?

MR. DELANEY: It actually talks about the business rule. I think this is a business records exception. There is a section that speaks to the absence of whether, demonstrating the absence of an event. I can grab the short memo I got on that.

THE COURT: Must be 803 something, right?

MR. DELANEY: I believe it is. Essentially, what he's testifying to is this would be a report given by employees --

THE COURT: Are you saying that by virtue of custom or practice or allegedly referring to an item of writing or oral?

MR. DELANEY: Yes, sir.

THE COURT: It's overruled.

(End of discussion at side bar.)

BY MR. DELANEY:

Q. Mr. Fisher, can you hear me?

A. Yeah.

Q. My last question was did the receptionist provide you a verbal report of the occurrence of any damage to the crate or equipment when it was shipped on February 5, 2003?

A. No.

Q. Did she provide you with any written report of damage to

110

the crate or the equipment when it was shipped on February 5, 2003?

A. No.

Q. Mr. Fisher, the exterior of this piece of equipment, what material is it made of?

A. The exterior of the machine itself or the crate?

Q. The machine itself?

A. It's some type of steel, stainless steel.

Q. And behind that steel is there another material, a shield?

A. Yeah, there's lead shielding.

Q. We've seen an exchange of e-mails that you had with Mr. Mullen. When this equipment arrived at Accu-Spec on February 5, 2003, did you view some digital photographs of the condition of the machine that day?

A. Yes.

Q. Did you make a recommendation about whether or not Accu-Spec should power up the machine or not?

A. Yes, I actually told them they should not power up the machine due to safety hazards associated with the X-rays.

Q. Does Dage have a facility in the United States where the type of damage you observed could have been repaired?

A. No.

Q. Lastly, this crating that is used to ship this machine, is there any possibility of the machine shifting in the crate

during transport?

MR. COHEN: Objection, foundation.

THE COURT: Sustained. Lay the foundation.

BY MR. DELANEY:

Q. Let me ask you, Mr. Fisher. How many of these types of machines have you shipped, either from the Fremont, California facility, either to trade shows or customers?

A. Probably about a hundred.

Q. Have you overseen in more than a few cases the crating of the machines?

A. Yes.

Q. Do you understand how they're crated?

A. Yes.

Q. Have you physically been involved in crating the machines?

A. Numerous times.

Q. Is it possible that a machine could shift inside the crate and cause some damage to the machine?

A. Only if it was dropped.

MR. DELANEY: That's all the questions I have, Mr. Fisher, there will be a couple other people who will ask questions of you.

THE COURT: All right, Mr. Cohen.

MR. COHEN: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. COHEN:
Q. Mr. Fisher, thank you for making yourself available.
A. No problem.
Q. My name is Jeff Cohen, I represent Central Transport International. Did you hear what I said, sir?
A. Yeah.
Q. You testified earlier about the model that was sold to Accu-Spec as having been used at a trade show, is that correct?
A. Yes.
Q. And you said that it was manufactured in September of 2002, correct?
A. Yes.
Q. And it was only sold to Accu-Spec five months later. In that five months, was most of its time spent sitting on the floor at the demo room in California?
A. Yes.
Q. And how do you know that it only went to one trade show?
A. Because I'm involved in all of the trade shows. I go to the trade shows to do the demonstrations on the machine.
Q. I see in your Web site you have trade shows in

Switzerland, Norway, France, Philadelphia, Chicago, all over the world really; is it possible that this machine may have been shipped to other trade shows as well?
A. No.
Q. Okay. And are other machines shipped around to different

113

trade shows?
A. Yeah, our office here is responsible for North America and South America. If there was a trade show over in Switzerland, that machine would come from a different office.
Q. But Chicago or Philadelphia, then you handle that one, right?
A. Yes.
Q. Okay. So in that five-month period, you're saying that there was only one trade show in North America or South America?
A. Yes.
Q. All right. Now, you said that the machine had 20 hours of use. How many X-rays has it made?
A. How many hours of X-rays?

Q. No, actually I'm trying to figure out, if you can, how many X-rays do you make in 20 hours?
A. I'm not sure you can actually count the number of X-rays.
Q. It is more than like one an hour?
A. Well, it's realtime X-rays. So once you turn the machine on, it scatters X-rays all inside the machine constantly.
Q. Once it's on, it's constantly X-raying?
A. Yeah, once you turn the X-rays on, yes.
Q. How do you get a sampling there, do you have to open the door and then close the door or open the door put it in, then close the door?

A. Yes, there's a loading door on the front of the machine.
Q. When you open the door, you got to turn it off, is that right?
A. Yes.
Q. All right. So it was turned on and off, I guess, for different X-rays, do you know how many times?
A. Well, the machine itself would always be on. You would just turn the X-rays off, just to clarify that.

Q. So the 20 hours is just X-ray hours?

A. X-ray hours, yes.

Q. Otherwise, it was just on the whole time?

A. Yes.

Q. So it would have been hundreds of hours that it was on, correct?

A. Yeah.

Q. At night is it on?

A. Yes.

Q. Twenty-four hours a day it's on?

A. Twenty-four hours a day, yes.

Q. So you testified that there were about -- a normal one of these use about 600 hours per year, correct?

A. X-ray on hours.

Q. X-ray on hours. Fifty hours a month about, I guess, correct?

A. Yeah.

115

Q. So if this thing was X-raying for 20 hours, it would have been like as if it was in full use for, well, less than two

weeks, correct?
A. Yes.
Q. Originally, my understanding is that Accu-Spec priced a new one to come from the manufacturing facility in England, the price was $135,000, is that correct?
A. I can't be positive but that sounds about right.
Q. And it's also testimony by the Accu-Spec representative here that they got the demo model for $120,000, is that consistent with your understanding?
A. Yes, that's correct.
Q. And the reason they got the $15,000 discount is because they didn't buy the new model, they bought the used model, is that fair to say?
A. Yes.
Q. With respect to the shipping of this X-ray machine, you said it originally comes from the United Kingdom, correct?
A. Yes.
Q. And it's put in this box which is built around it, right?
A. Yes.
Q. And is it fair to say, I guess you already testified that it moves around in the same box from place to place?

A. Yes.

Q. At a certain point does the box get tossed out and

because of wear and tear on the box?

A. Not normally. Normally by the time we sell the demo unit, the crate goes with the demo unit. And then we just get a new machine in a new crate.

Q. Okay. If it goes to ten trade shows or five trade shows, the box moves five times?

A. Yes.

Q. The machine, as packaged, Dage chose not to put bracing at the top of the machine, correct, internal?

A. Yes.

Q. Dage chose not to put bracing at the mid point of the machine, is that correct?

A. Yes.

Q. Do you know what a tip and tell device is?

A. Yes.

Q. What is a tip and tell device?

A. A tip and tell device is a device you put on the outside of a crate and if the machine is tipped, there's little blue beads that will go on to the top section indicating that it had been tipped.

Q. And I guess they stay there so when it comes to the destination, you can tell it was tipped?

A. Well, yeah, it should be on the crate.

Q. If a tip and tell indicator wasn't activated, if it didn't show -- if the tip and tell indicator was not activated,

that would show the crate didn't tip, obviously, is that right?

A. Yes.

Q. Also, Dage chooses not to use any hard core foam, like when you get a TV set, the hard foam packing around the corners internally, is that correct, they choose not to do that?

A. Yes.

Q. And on the outside structure of the crate, Dage chooses not to put diagonal pieces of wood for additional structural stability, isn't that correct?

A. Yes.

Q. With respect to the movement of the crate within the box,

it's, of course, possible that the freight being transported on a truck or otherwise could shift within the box because of the nature of transportation, is that fair to say?
A. No.
Q. And you say that it can't shift because you brace it at the bottom?
A. Yes.
Q. And you did not witness the packaging of this particular machine, is that correct?
A. No.
Q. Do you know if the braces to keep the stages from moving were installed personally?
A. When the crate came back from the trade show, when I unpacked it, all of the braces were intact.

118

Q. Right, when it went from your facility to Accu-Spec, since you weren't there, you don't know if those braces were installed, correct?
A. No, I don't.
MR. COHEN: Thank you, very much, Mr. Fisher, for

your time.

THE COURT: All right, Mr. Knox.

MR. KNOX: Very briefly.

CROSS-EXAMINATION

BY MR. KNOX:

Q. Mr. Fisher, good afternoon, my name is John Knox and I represent Logistics Plus in this matter, you may remember me from the deposition. I just have one item, I want to talk to you about --

THE COURT: Let's go right to it.

BY MR. KNOX:

Q. Mr. Fisher, isn't it true that Dage places a printed out letter folded up and taped on the outside of the crate which says you must use a 10,000 pound forklift when unloading it?

A. Yes.

Q. Why does Dage place this letter on the outside of a crate?

A. Once the system is loaded into the truck for shipment, we have no control over the movement of the machine at that point. And the machine weighs approximately 5,000 pounds, but because of the weight distribution, you cannot use a 5,000 pound forklift to lift it. You have to use a 7,500 pound or above, that's the reason we put it there, to make everybody aware of the fact that you must use a big forklift to pick the machine up.

Q. I saw you talking about that at your deposition, is it fair to say that this letter, that is taped on the outside of the crate, is intended for truck drivers and forklift drivers?

A. Yeah.

Q. Lastly, does this letter at all mention what's inside the crate is in fact an X-ray machine, an industrial X-ray machine?

A. No.

Q. What does the letter say?

A. I can't remember, but paraphrasing it says something to sort of you must use a 10,000 pound forklift when picking up this crate.

Q. In looking at the damage photos in this case, do you have an opinion as to whether perhaps an underrated 5,000 pound forklift was used in this case as opposed to 10,000?

MR. COHEN: Objection, your Honor, foundation.

THE COURT: Sustained. Don't answer that.

BY MR. KNOX:
Q. Mr. Fisher, have you had any experience in dealing with episodes where you have personal knowledge of seeing an underrated forklift machine drop an X-ray machine of this

weight?
A. Yes.
Q. Based on that experience, is that the basis for your opinion as to whether or not a forklift machine was used properly here?
MR. COHEN: Objection.
THE COURT: It's speculative, sustained.
MR. KNOX: I have nothing further, thank you.
MR. DELANEY: That's all, your Honor. Thank you, Mr. Fisher.
THE COURT: Thank you very much, we're going to turn off the TV now. Members of the jury, as I said, I've got a criminal sentencing I've got to do. We'll be in recess, we'll get back to you as soon as we can.
(Jury Trial was in recess from 1:36 p.m.; until

2:25 p.m.)

THE COURT: Mr. Delaney.

MR. DELANEY: I think we are resting, I know that we are resting, your Honor. I need to make sure I moved the admission for Plaintiff's Exhibits 1 through 25. And there is another exhibit entitled Defendant's Exhibit CT-5, which is the e-mail, I would move its admission as well.

THE COURT: Any objection to any of that?

MR. KNOX: No objection.

MR. COHEN: No objection.

THE COURT: All right, then those are admitted.

MR. DELANEY: Thank you, your Honor.

THE COURT: All right. On to the defendant's case.

MR. DELANEY: I think we had Mr. Horetsky on the stand, I think Mr. Knox still had some questions.

MR. KNOX: That's correct, I just have a few more questions.

THE COURT: Good enough. Mr. Horetsky if you could get back on the stand.

(Continued) - CROSS-EXAMINATION

BY MR. KNOX:

Q. Very briefly, Mr. Horetsky. After Central Transport picked up the freight in California, who had possession of the freight from California to Pennsylvania?

A. The freight would been in our possession when we moved it through our system.

Q. Who handled the freight during this period of time?

A. That would have been dock handlers within Central Transport --

Q. Are those contractors or agents of Central Transport?

A. I couldn't speak to the specifics, but Central has employees and contract workers.

Q. Mr. Horetsky, did you personally inspect the crate after the damage was discovered?

A. After receiving a call to basically requesting me to go

122

take a look, I did go down to Accu-Spec and take a look at the crate.

Q. And is it your testimony that you believe that the machine had shifted in the crate after looking at it?

A. Based on my experience, it appeared that the machine had somehow shifted in the crate that it was originally packaged in.

Q. Did you reach an opinion as to whether you thought it was packed correctly based on your inspection?

A. I wasn't really there to make that determination, but just a quick visual inspection, based on my experience, seemed to be insufficient packaging, yes.

Q. And when you inspected the crate, did you notice symbols on the outside of the crate, namely a wine glass?

A. I could not say at the time I was there that I noticed any markings on the crate.

Q. Looking at that picture, which again is Exhibit 9, Plaintiff's Exhibit 9, do you see those wine symbols?

A. I do see those symbols, yes.

Q. Do you know what those symbols mean?

A. Typically, a wine glass would indicate fragile or glass. And the umbrella would indicate to stay dry.

Q. Do you know who those symbols are intended for, are those for the truck drivers?

A. I would say the symbols would be involved, would be on

there for anyone that would move the freight, anytime from beginning to end, or even sitting on the dock at the shipper's location or when it's received, just to indicate if it's sitting on the dock, there is some indication of what precautions might need to be taken.
Q. Thank you, just one last point. If Logistics Plus here on behalf of Accu-Spec tried to negotiate the best deal possible, the lowest rate possible for this shipment, if it's a really low rate, does that benefit Central Transport in any way, does it benefit the bottom line if it's a lower rate versus a higher rate?
A. We're a for profit company, it would not benefit us.
Q. Would it benefit Logistics Plus?
A. I couldn't speak to that, but I would think not.
Q. If it's a lower rate, isn't it true that really the person who benefits here is Accu-Spec?
A. The ultimate person responsible for freight charges, sure.

MR. KNOX: Thank you, I have nothing further.

CROSS-EXAMINATION

BY MR. DELANEY:

Q. Mr. Horetsky, I'm Patrick Delaney and I represent Accu-Spec. I want to ask you a little bit about rates just so I have an understanding of them. Before I do that, let me ask you this. Prior to learning of damage to this equipment and

crate on February 14, 2003, did you have any direct contact with anyone from Accu-Spec about this shipment?

A. Prior to that, no, sir.

Q. You were the salesperson who was responsible for receiving the order from Logistics for this freight?

A. I was the person who answered the phone when the rate quote was requested.

Q. Did you have any other dealings about this freight between February 5th and February 14th of 2003?

A. None whatsoever.

Q. You've explained to us that there are different rates, one of which is rate 50, and another is rate 100, is that

correct?
A. That would relate to classes of freight. Class 100,
Class 50.
Q. When we use the term rate, are we talking about price?
A. Rate is the price, that's correct.
Q. So we should talk about class. There is a Class 50, is
that correct?
A. There's a Class 50 through Class 500.
Q. Have you determined that this should have been some class
other than 50, this freight?
A. Did I determine that?
Q. Yes.
A. Never prior, only after seeing the material or seeing the

125

machine.
Q. That's what I mean, you're coming here today and saying
to the jury this was the wrong class, is that what your
testimony is?
A. Based on the machine that was shipped in the crate, the
class as indicated on the bill of lading would not have been

correct.

Q. And that class rating, your testimony is that class rating was given to you by someone from Logistics Plus?

A. The request for the class rate was given to me, that's correct.

Q. Does that mean that they asked for that rate, that price, but they didn't really try to say to you this is a Class 50 product?

A. For the purpose of quoting, which we get a lot of customers will call and ask for quotes. They'll specify classes and we, based on that class, would provide a freight rate.

Q. So when Mr. Fanzini said to you can you get me a Class 50 rate, what he meant was give me a low price, is that your understanding?

A. What he meant was give me the Class 50 rate and that's what I did.

Q. But he wasn't representing to you that it was a product that should be classified as Class 50?

A. There was no indication as to what the product was or if he even knew what the product was, there was no discussion as to that.

Q. But you agreed to give him a Class 50 price, correct?

A. That's correct. Any customer that calls up and they indicate the class, we're relying on the fact that's what you're asking us. They're asking for a Class 50 rate, that's what we give them. They asked for a Class 100, we're assuming that they are knowledgeable of what the class is, we're providing that rate to them.

Q. But you didn't take it that day, you didn't take Mr. Fanzini's comment to mean this is a product that falls within Class 50, you just knew he wanted a price that would be equal to a Class 50, isn't that correct?

A. That's correct. I didn't know if it was a Class 50 or if it wasn't.

Q. Now, is there any rule that says that you cannot respond to a customer and insist that you know what the freight is?

A. There's not a rule of that nature.

Q. So you could have essentially said to, and I hope I'm pronouncing his name correctly, Mr. Fanzini, that I'm not going to give you any price until you tell me what the product is?

A. You could do that to make sure they know exactly what the class is.

Q. Now, if you decide to give a price at Class 50, does that

mean that Central Transport will transport the freight differently than if you gave a rate 100 or, I'm sorry, Class 100 rate?

A. As I indicated earlier, we're going to handle all the shipments with care.

Q. So your answer is there is no difference in the manner in which you will handle the freight, whether it's Class 50 or Class 100?

A. I'm not actually handling the freight, but I would say it is going to be handled in a professional manner.

THE COURT: Hang on a second, listen to the question.

THE WITNESS: Yes, sir.

BY MR. DELANEY:

Q. Will Central Transport handle the freight in the same fashion if it's Class 50 or Class 100?

A. Yes, we will.

Q. The class designation does not change the care with which the trucking company is supposed to handle the freight, isn't that correct?

A. That's correct. It will effect the liability issues associated with that.

Q. Now, there's been a lot of testimony, I guess from you on direct, that nobody told us what the equipment was, is that correct?

128

A. That's correct.

Q. Do you know if the gentleman from Logistics told you it was equipment?

A. There was no discussion as to what it was.

Q. But when the trucker gets to the Fremont, California location, he sees a wine glass or should see a wine glass on the crate, what does the wine glass tell the trucker?

A. An indication on the carton would be that there could be some glass or some fragile product in the crate.

Q. Do the dock workers know that, too, what the wine glass

means?
A. I'm not a dock worker, I couldn't speak to that.
Q. Well, is it commonly known in your experience throughout the work force of Central Transport what the wine glass means?
A. Yes.
Q. And what the umbrella means?
A. Sure.
Q. If a Central Transport trucker shows up at a pick up location and finds a crate that is damaged that he is supposed, he or she is supposed to load on the truck, what is that trucker going to do?
A. I would say that he would probably call dispatch.
Q. Is it generally understood among Central Transport's workers that they're not to take possession of a damaged piece of freight or a damaged crate until they have some

129

authorization from --
A. It would be common sense that we would not accept visually damaged freight.
Q. Now, is there any procedure for making notations on bills

of lading with regard to damage?
A. If there is visual damage that can be noted, it could be noted. More likely, we would not take the shipment.
Q. Let me show you what we previously marked as Plaintiff's Exhibit No. 25. First off, let me give you the whole picture of it. Then I'm going to bring it in a bit, ask you if you've ever seen this particular document before?
A. I have, yes.
Q. Is this the bill of lading that was delivered to the Central Transport trucker in Fremont, California on February 5, 2003?
A. This is the bill of lading tendered to the driver at the time of pick up, that's correct.
Q. Is there any notation on the bill of lading about damage to either the crate or the equipment?
A. No, no notation.
Q. It's a clean bill of lading, that what it's referred to in the industry, isn't it?
A. It is.
Q. Okay. Let me show you another document that we put into evidence, this is Exhibit 22, let me just hand this to you.

It's a letter, it's already been identified as a letter from Central Transport denying Accu-Spec's claim for damage to this equipment. Have you ever seen it before?
A. Yes, I have.
Q. And what does the first sentence of that letter say?
A. We have conducted an investigation of your claim and have found no liability on our part.
Q. And who is it signed by?
A. Jeffrey Cackowski, claims manager.
Q. Where is Mr. Cackowski's office?
A. That would be our home office in Warren, Michigan.
Q. He is coming to trial to testify?
A. Yes, he is.
Q. All right. Do you know what investigation he performed?
A. That is his position and his job, I couldn't speak to that.
Q. Did he call you?
A. I do not recall if he directly called me in regards to this.

Q. When you went to the Accu-Spec property on February 14, 2003, did you meet with Mr. Mullen?
A. Briefly, yes.
Q. And did you view the crate?
A. Yes, I did.
Q. Was the crate damaged?

A. There appeared to be minor crate damage, yes.
Q. You saw the photographs?
A. Yes, I did.
Q. Was the damage you observed consistent with those photographs?
A. As it relates to the crate, yes. With the internal, I did not visually see that because it wasn't completely uncrated, there were no sides off the crate.
Q. Did Mr. Mullen tell you that the damage to the crate was in existence as the crate came off the Central Transport truck?
MR. COHEN: Objection, hearsay.
THE COURT: Overruled.
THE WITNESS: The situation that was told to me was

there was damage to the crate noticed sometime between getting it off and on the ground.

BY MR. DELANEY:

Q. I'm sorry, who's the gentleman that wrote the denial --

A. Jeff Cackowski.

Q. Let me finish the question.

THE COURT: You're jumping in to fast, see that guy there, he can only get one of you down at a time, so don't jump in on his question. Go ahead.

BY MR. DELANEY:

Q. What was the name of the gentleman again who made the denial?

A. Jeffrey Cackowski.

Q. If Mr. Cackowski had called you up before writing that denial, would you have told Mr. Cackowski I went to Accu-Spec, I saw damage to the crate, they told me the damage was there as it was unloaded, would you have told him that?

A. If I was called by him and he requested that, sure.

Q. But you weren't called?

A. No, we did have an inspection made of the material.

Q. Did you look at the inspection of the equipment that was done by Central Transport's contractor?

A. Through this litigation, yes.

Q. You didn't direct that that inspection be done, did you?

A. Indirectly, yes.

Q. Okay. Do you know the name of the firm that performed the inspection?

A. MTI Inspection Services.

Q. Let me show you what's been previously marked as Defendant's Exhibit CT-9 and ask you if that document appears familiar?

A. Yes, it does.

Q. Is that a report of MTI, the inspectors who looked at this equipment in Erie?

A. Yes, sir, it is.

Q. Can you read what they say about the damage?

A. "One Dage XL6500 Accu-Spec X-ray machine punctured. The

right corner of the case is dented, the operator shelf is pushed into the case. The shelf is bent. The button center is bent and loose. The left corner of the shelf is scraped. The unit is sitting on an angle inside the crate. The left side is bent. The unit has shifted from its base and has punctured the floor of the unit."

Q. Did that report come to you from MTI?

A. No, sir.

Q. By the way, what is the date of the report, just so we have the context?

A. Date inspected 2/19/03.

Q. So it's before the denial of Accu-Spec's claim by the gentleman from Central Transport?

A. It is.

Q. Okay. Let me show you what is Plaintiff's Exhibit No. 15, were you able to visualize this portion of the X-ray machine when you visited Accu-Spec's property on February 14, 2003?

A. Very, very limited visual of that part of the machine.

Q. Do you dispute that this is a piece of equipment that is encased, it's outer shell, is that of steel?

A. Stainless steel.

Q. Did you dispute that immediately inside the steel is a

lead lining?
A. I would not be able to speak to that, I don't know.

Q. Do you dispute that that photograph shows that the force supplied to this piece of equipment essentially distorted that steel shelf?
A. The shelf was distorted, yes.
Q. And is it your position that had some sort of foam packing been used at the corner that that kind of damage wouldn't have happened?
A. I'm not an expert, I would say it's very possible that that type of damage could have been prevented, yes.
Q. By foam packing?
A. Proper packaging, yes.
Q. By foam?
A. Yes, sir.
Q. And by some diagonal strip on the crate, you're suggesting that that kind of damage could have been prevented by a diagonal member across the crate?
A. With proper packaging throughout the crate, yes, sir.

MR. DELANEY: Thank you. Those are all the questions I have, your Honor.

THE COURT: All right, anything further of this witness?

MR. COHEN: Yes, your Honor, just a couple.

REDIRECT EXAMINATION

BY MR. COHEN:

Q. Let's talk about packaging for a second. You've

testified with regards to packaging both on direct and on cross-examination. With respect to internal packaging, if a 2-by-4 was placed here and at the top and also placed across the other sides locking this machine into its position within the crate, do you think that would have prevented this damage?

A. I think it would have been much more likely that no damage would have occurred.

Q. When you talk about foam packaging, are you talking about those plastic peanuts that you see in boxes that you get from UPS?

A. No, I'm specifically speaking to foam mold that people in this industry, similar to if you buy a television set or an air conditioner, you would have custom foam in the carton where you can almost pick that box up and shake it and there is no threat of anything moving within the box. And Central, essentially, a crate, something similar and commonly is packed that way in the industry.

Q. I'd like to shift to the responsibilities of a driver. Is it fair to say that there are many employees of Central Transport and the jobs are diversified?

A. That's correct.

Q. For instance, you don't drive trucks, right?

A. I do not.

Q. People in the accounting department don't do sales, correct?

136

A. That's correct?

Q. Similarly, the truck drivers drive the trucks, correct?

A. That's what they do, yes.

Q. Are they certified to drive trucks?

A. Yes, they are.

Q. When they go to a shipper or an origin location, when they pick up freight, can you describe to the jury what paperwork they get when they go to that shipper?

A. Typical procedure would be for a driver to get a bill of lading, they would receive a copy of the bill of lading and leave a copy of the bill of lading with the shipper. Would indicate the day and time, normally the driver's name, when they picked up the shipment.

Q. The driver doesn't come to the location with the bill of lading in his hand, correct?

A. No, he does not.

Q. Once the driver gets the bill of lading, is it my understanding he looks at the description, if it says crate, he looks around for a crate, is that right?

A. That's correct.

Q. So his job is pretty much to verify the piece count and that physically it's generally what it describes, is that fair to say?

A. To the best of his ability, yes.

Q. Is he charged with opening up crates and boxes?

A. In no way, no.
Q. Are drivers trained in the complexities of rate structures?
A. As you indicated, they drive the truck, that's basically what they do.
Q. You were questioned about whether or not Central Transport would have handled the freight differently if it would have had a different classification on it, for instance, if it was 100 instead of 50, you said no, correct?
A. That's correct.
Q. Before we get to that, if the freight, if Central knew the freight was misclassified, is it fair to say they never would have entered into the contract for the rate provided?
MR. DELANEY: Objection, leading, your Honor.
THE COURT: Sustained.
BY MR. COHEN:
Q. Although the rate may be different or although if the class is different, is the rate different?
A. Yes, it is.
MR. COHEN: Thank you very much, Mr. Horetsky.

THE COURT: Anything further of this gentleman?

MR. KNOX: Nothing further.

THE COURT: Thank you sir, you're excused. Mr. Cohen, you may call your next witness.

MR. COHEN: Your Honor, thank you. At this time

Central Transport calls Jeffrey Cackowski.

THE COURT: All right. Mr. Cackowski, would you please spell your name for my court reporter?

THE WITNESS: It's C-a-c-k-o-w-s-k-i.

JEFFREY CACKOWSKI, CENTRAL TRANSPORT WITNESS, SWORN

DIRECT EXAMINATION

BY MR. COHEN:

Q. Mr. Cackowski, good afternoon.

A. Good afternoon.

Q. Could you please describe for the jury -- well, first state your name and your business address for the record?

A. Jeffrey Cackowski, 12225 Stephens Road, Warren, Michigan.

Q. And who are you employed by?

A. Central Transport International.

Q. What is your job title?

A. Claims manager.

Q. If you could describe for the jury members what your job history has been, well, before Central Transport started?

A. Before Central Transport, I started with Central Transport out of college, prior to that I did do an internship with the U.S. government, in supply. Since then I've been employed by Central Transport, started out as a rate clerk. Shortly after that I became a junior claims analyst, senior claims analyst, claims prevention manager in the operational area, and currently a claims manager.

Q. Okay. Very briefly, since you had a long chain of movement there, if you could describe your job responsibilities along the way?

A. As a rate clerk, years ago before the computer technology, as we have it now, although we had some, didn't have as much as then, involved with rating freight bills and processing payments. Discrepancies in payment. Then a junior claim analyst, started to learn claims, what claims are about, claims law. And working with lower dollar claims. Then got into the senior claims analyst, got into higher dollar claims. More corporately involved with bigger accounts, we're automated based for GM, Chrysler deals. As a claim prevention manager, claims prevention in our operations department works with preventing claims so there are claims to process. Establishing procedures and policies in order to perfect claims. From there claims manager, running the claims department.

Q. That's where you are now?

A. That's where I'm at.

Q. Are you familiar with this dispute?

A. Yes, I am.

Q. What I'd like to first talk about is you're familiarity with documents that are used in the transportation of freight is somewhat a little confusing. First, describe to the jury, if you will, what a bill of lading is?

A. A bill of lading is basically a contract of carriage.

140

It's a contract between the shipper and the carrier to transport goods from point A to point B. I don't know if we

need any more detail than that.
Q. I think that generally does answer the question.
Generally, does the shipper prepare a bill of lading?
A. Generally, a shipper has a bill of lading prepared at the time of pick up by the driver.
Q. Okay. Now, when the freight is transported pursuant to the bill of lading, does the bill of lading, well, I'll use the word incorporate other documents with rules regarding the transportation of freight?
A. The bill of lading, as you see, is basically a short form. A long form on the back of it, there are, basically, I think 12 rules and regulations that gives a stipulation test regarding the handling of freight. From that there are other tariffs that the applicant in regards to the National Motor Freight Classification or other carrier tariffs that are applicable to the movement of the freight.
Q. This document has been faxed on multiple occasions, but has small print on the top of the document, which I'm going to attempt to read. For your Honor's information and for counsel, this is the bill of lading found at Exhibit 13, which is also Logistics Plus bill of lading which from my evaluation has the same language as the document marked CT-1. So CT-13 is

Logistics bill of lading with the same language as CT-1,

however, you can read it on this copy. So I'm going to read it.

THE COURT: Which one again is this?

MR. COHEN: Yes, your Honor. CT-13, it's in a book that was provided, I do have an additional copy for your Honor if you do not have one.

THE COURT: Go ahead.

MR. COHEN: I'll do my best to blow this up, this is the actual bill of lading, but I do not expect to truly be able to read this that well, if at all. Because of the difficulty in this copy.

THE COURT: Do you have it where you can just read it?

MR. COHEN: I'm going to do that right now, your Honor.

BY MR. COHEN:

Q. On the top of the bill of lading there is information -- this is the bill of lading prepared by Logistics Plus?

A. This is the bill of lading prepared by Logistics Plus, yes.

Q. It says on the top straight bill of lading short form, original, not negotiable. Received. That's all in capital letters. Subject to classifications and tariffs in effect on the date of the issue of this bill of lading. Let me stop there. Does Central Transport have what's called a tariff?

A. We have the rules tariff CTI-100 is our rules tariff which establishes different rules and in conjunction the movement of any freight as tendered to us.

Q. When you say CTI-100, it's Central Transport International, Inc. 100?

A. Correct.

Q. It's an abbreviation, correct?

A. Right.

Q. Further on in this paragraph, it says, essentially, that the applicable motor carrier classification or tariff shall apply. And that's further down in the first paragraph. Is there a motor carrier classification or tariff that you're

talking about when you say CTI-100?
A. Well, there's the National Motor Freight Classification, trying to cover, also try to cover any other carrier tariffs that are applicable.
Q. We have I think a total of about three documents that were done here, okay. I'm going make it make it as simple as possible. The first one is a bill of lading, correct?
A. Correct.
Q. And then the next one I'd like to talk about to the jury is the CTI-100, basically, Central Tranport's tariff, correct?
A. Rules tariff.
Q. I'm going to show you an exhibit, actually, you have the exhibit in front of you, it is marked as Exhibit 3, Central

143

Transport 3. And I'll put the face page of this exhibit on the monitor for the jury to look at, you can get an idea. Okay. Looking at CT-3, is this the Central Transport International 100-C rules tariff?
A. Yes, this is the cover page.
Q. It's actually says on there "applies only when reference

is made hereto." Did the bill of lading reference this document?

A. The bill of lading specifically references it on the pick up sticker down on the bottom of the bill of lading.

Q. And in addition to that, does it also reference the carrier tariff in the paragraph I read earlier?

A. Well, yes, a general paragraph, Logistics Plus on their bill of lading carrier's tariff.

Q. Let me show you that particular sticker so we know what we're talking about here. This is the Logistics Plus bill of lading, you mentioned the sticker and this is something that I'm going to blow up right there; is that the sticker you're talking about?

A. Correct, it incorporates the National Motor Freight Classification.

THE COURT: You're way too fast and you're way too low. You're a big man, pull the mike in, speak into it.

THE WITNESS: Okay.

MR. COHEN: We're going to slow down.

THE COURT: We are going to slow down. Let's go.

BY MR. COHEN:

Q. The sticker, it says subject to MNFC-100/CTII-100, stop there for a moment. CTII-100, this tariff?

A. Yes, it is.

Q. This is the thing that says NMFC, what does that stand for?

A. National Motor Freight Classification.

Q. We're going to get to that. Let's talk about the sticker. Who puts the sticker on the bill of lading?

A. Our driver at the time of pick up.

Q. This person here, correct?

A. Correct.

Q. It is indicating the name of the driver. Okay. Now, within this document the Central Transport tariff, what is this document, generally?

A. The tariff incorporates numerous rules and regulations for handling freight with Central Transport. Could be rules for inside delivery charges, there's numerous rules. Our liability of limitations of course are in there. Which are important in this matter.

Q. Did you say limitation of liability are included in this document?
A. Yes, they are.
Q. I'd like you to turn in Exhibit 3 to page CT0159, that is

denoted in the bottom right-hand side, stamped number. Please tell me, sir, when you come to that page?
A. I have.
Q. This section is called governing publications, what does this say with respect to the use and incorporation of the National Motor Freight Classification?
A. It indicates that the National Motor Freight Classification is the governing tariff within the CTII-100 tariff.
Q. So to get it all laid out, we have the bill of lading, we have the Central Transport tariff, and now we have the National Motor Freight Classification tariff, correct?
A. Correct.
Q. Together, do all of these documents govern the transportation of this freight?

A. Yes.
Q. I'd like you to turn the page where the number on the bottom right-hand side is CT0237. Where you have that, please tell me and I'll ask a question.
A. Okay, I have it.
Q. What's the process by which this rule book, Central Transport rule book, updated?
A. At this time there were addendums or revisions attached to the rear of the tariff.
Q. And this shipment moved in 2002, correct?

146

A. I believe it was February of 2003.
Q. Sorry, February of 2003. Was this the most recent -- well, let me ask this. Is this tariff broken up into item numbers?
A. Yes.
Q. And what does the item number mean?
A. Well, it's just a chronological numbering system for reference, I guess. Different topics are covered under different items.

Q. What is the topic of this item number 579?

A. Item 579 deals with used articles or commodities.

Q. Was this the version of item 579 which was in effect at the time the transportation occurred in this case?

A. Yes.

Q. I'm going to read a section to you and ask you a question. It says "shipments of used articles or commodities will not be accepted by the carrier unless the shipper releases the value to not exceed 10 cents per pound per package or declares a higher value and agrees to pay an additional charge." In this case did the shipper declare a value of the freight on the bill of lading?

A. No, they did not.

Q. Did the shipper agree to pay an additional charge?

A. No, they did not.

Q. Next section, this says number one. "If shipper desires

to tender," what does that mean, to give?

A. Correct.

Q. "A shipment with a value in excess of 10 cents per pound,

the shipper must indicate the released value on the bill of lading. Carrier will assess an additional charge of 26 cents per each of $100 or fraction thereof, declared by the shipper in excess of 10 cents per pound." Was there any additional charge or additional value in the case?
A. No, there was not.
Q. The next section says "if a shipment is inadvertently accepted without the declaration of released value, it will be considered to have been released to a value not exceeding 10 cents per pound per package, and charges assessed on that basis. Carrier's liability will be 10 cents per pound per package. A corrected bill of lading will not be accepted to change the released value once the shipment has been accepted by the carrier." In this case, well, why does Central Transport have this item in its tariff?
A. For protection against used articles. Used articles have an inherent nature of problems in regards to damage. And we had as a carrier experienced numerous debates of our liability without prior to having this item, in regards to what the carrier liability is for the damaged used article.
Q. Now, this item has two options, is that correct?
A. Yes, it does.

Q. You can either release it at 10 cents per pound by not putting a value or you could declare the value and pay more money, is that correct?
A. Correct.
Q. In this case there's been testimony by the Dage employee that the machine was discounted because it was used, the demo machine was discounted because it was used. Would this tariff item apply to the machine in this case?
A. Most definitely.
Q. Now, I'd like to move onto the next document you mentioned and I'm going to --
THE COURT: Mr. Cohen, you can presently. Members of the jury, we're going to take a short break.
(Recess from 3:10 p.m.; until 3:25 p.m.)
THE COURT: All right, sir, would you resume the stand.
BY MR. COHEN:
Q. Before we broke we were talking about the Central Transport's tariff. Before we get into the National Motor

Freight Classification, I hope everyone can stay awake for all this, it's tough. But the question I have for you is why does a trucking company need a tariff, would basically a trucking company be able to survive without a tariff?

A. Well, history shows that no, they can't. Protection is needed in regards to -- limits of liability. The motor

carrier, the motor carriers were the last ones basically to put these into effect. You have the air industry, you have the rail industry, you have the OSHA industry that all have limitation of liability. We carry trucks that average 40,000 pounds on them. We may have a thousand trucks running a night. We need to have some type of knowledge of limitation of what we have. So it's for protection.

Q. Does a trucking company work on a very small margin, is that one of the reasons protection is needed?

A. Right. All a truck company, basically a good company runs anywhere from 98 to maybe 97 percent operating ratio. Meaning that it takes 98 percent revenue dollars to operate. Two percent profit. It's a small profit margin.

Q. You said the acronym LTL, what does LTL mean?

A. LTL, I'll try to talk slower, less than a truck load. Versus a truck load carrier where a truck load carrier picks up a truck load of freight and delivers it to the destination. A less than truck load carrier consolidates shipments at different break points throughout the country.

Q. The next item that we discussed which I'd like to talk about now is this thing called the National Motor Freight Classification. And correct me if I'm wrong, that document is incorporated into the carrier tariff, correct?

A. Correct.

Q. I'm holding a book that's a couple three-inches thick, it

150

says in the face National Motor Freight Classification. Actually says your name on it, do you know what this is?

A. Yes.

Q. What is it?

A. It's the National Motor Freight Classification. It basically has every commodity that you can think of. From this table to this monitor or this microphone. In a different

classification rating on it for transportation purposes.
Q. Let me ask you a couple questions because there is different terminology moving around. One question I have is there is something called an item number and something called a classification number, correct?
A. Correct.
Q. First I'm putting on the exhibit monitor for the jury and I'll ask you a couple questions about that. It's Exhibit No. 4 in Central Transport's exhibits. All right. On the left-hand side of this there is a column that says item. Do you see that?
A. Yes.
Q. What does the item number mean?
A. The item number corresponds with a particular commodity. So each commodity has an item number as a reference.
Q. On this page we have at the top vacuum tubes and they're classed and the number for that is 63470, is that right?
A. Correct.

Q. Now, on the other side of the page on the right side of the page of Exhibit CT-4, there is a column called class. What is the class?

A. The class that we talked about a little bit today, there are classes ranging from Class 50 to Class 500. The lower the class, for each associated class, there will be the rates that goes with that to move the commodity. The lower the class, the lower the rate to move the commodity. The higher the class, the higher the rate.

Q. Now, this page has a subheading electrical equipment. Is it your testimony that this is just everything out there from chemicals to food to game toys, iron and steel, is all in this book, it's got a number out there?

A. Correct.

Q. On this particular page, we happen to have the print out for our case, X-ray machines. Do you see that?

A. Yes, I do?

Q. X-ray machines are given class numbers, is that correct?

A. Yes, they are.

Q. And the classification numbers, is it correct that the classification numbers for X-ray machines are based on value in part?

A. Well, in part this particular item number does have a breakdown based on the value of the article.
Q. The first one under this X-ray item number 63560, sub

one, says actual value not exceeding $30 per pound, and identified as Class 100. Do you see that?
A. Yes, I do.
Q. And this X-ray machine, per the testimony, is valued at $120,000. Would Class 100 be an accurate characterization of the X-ray machine which is the subject of this litigation?
A. Based on weight and value that we have now in front of us, yes.
Q. The freight bill indicates Class 50, is it your testimony that this freight was misclassified?
A. Without a doubt.
Q. What components go into the determination of how something gets its class number?
A. There's a committee that determines the value, determines the class for a commodity. And they took numerous things into consideration. One is density. One being stability, which is

how it's stackable, size wise and so forth. Value is a consideration. There's numerous factors that they use.

Q. I'm going to show you the second page of CT-4, it is a document which is from the National Motor Freight Traffic Association, let me ask you this. Is the National Freight Motor Freight Traffic Association a group that puts together the National Motor Freight Classification?

A. It gets all too complicated. But this is the group, I'm not sure of their exact names or not, there is a committee that

153

makes classification, when a new item comes out, say a new TV is on the market, it's a plasma TV. It's the committee that comes down together to determine what the proper class is for a plasma TV. It's this committee here that is involved with that.

Q. Now, there is a chart, it's called the National Classification Committee Value Guidelines. And on this chart it lists the class and the maximum average value per pound. Do you see that?

A. Yes, I do.

Q. For Class 50 items, it lists the maximum average value of 99 cents a pound, do you see that?
A. Yes, I do.
Q. And for Class 100 items, it lists maximum average value of $24.39 cents per pound, do you see that?
A. Yes I do.
Q. Now, is this the basis, is this one of the bases that Central Transport charges higher rate, freight rates for higher class goods?
A. You could say that, but that's kind of an indirect, that's an indirect correlation, I would say. You know the class is based on what the rate is going to be. If this is a factor in determining the class, then yes, you have all the way down the line correspond those two together.
Q. Okay. So just to make it clear, I don't want it to be

unclear, it's confusing enough as it is, just to make sure we're clear. The rate is based on class, correct?
A. The rate is based on class.
Q. Does the National Motor Freight Classification also have

a section on specifications for packaging crates?
A. Yes, in front of the National Motor Freight Classification, I didn't really get a chance to explain it. There are other rules stated in front. In the back there's some package concerns and so forth. There's all kinds of information. But to answer your question, there is a specific item in regards to the specifications for shipping crates.
Q. I'm showing you on the screen, can you see that?
A. Yes.
Q. Item 245 of the National Motor Freight Classification, has definition or specifications for crates, are you familiar with this provision?
A. Yes, I am.
Q. Could you explain to the jury what this is?
A. Well, classification or how the crate should properly be constructed for safe transportation. There's different guidelines that are placed in there that take into consideration what the crate is going to take into effect during motor carrier transportation. This is not -- anything it's for motor carrier. And there are certain specifications that are spelled out in this item number.

Q. Could you describe, I'm glad you raised this point, describe for the jury what in the normal transportation by a motor carrier, what stresses must the package be designed to withstand to be in the back of a tractor-trailer?

A. Well, there are a lot of forces that are apparent, I don't know if everybody has ever road in the back of a pickup truck or the back of a semi. We do that for some training for some of the dock men. Trailers are subjected to heavy bounces and very big movement. It's different in the rear of the trailer or the front of the trailer or the mid of the trailer. Because those forces, packaging must be of certain specification. There are specifications in here of ever type of package, when in a carton, you can ship it in a --- in a drum. There's boxes, there's all kinds of specifications that have to be met for motor carrier transportation.

Q. Okay. And in this case we're dealing with crates, so we look at item 245. There are six items that are listed with respect to crating. Did you see the pictures of the crate?

A. Yes, I did.

Q. Did you hear the testimony about the crate?

A. Yes, I have.
Q. Let me ask you this. How long have you been handling freight claims issues?
A. About 20 years.
Q. How many times in 20 years have you seen damage to crates

156

similar to size and weight of the crate which is the subject of this litigation?
A. I've seen many, many damages. Many that are severe in regards to the transportation movement. So I've seen many.
Q. Based on your experience and after reading the item 245 and looking at the pictures and hearing the testimony, have you come to a conclusion as to whether or not the crate used in this case was or the freight in this case was packaged properly for transportation in the back of the tractor-trailer?
A. There are some obvious lacking factors that can be pointed out just by looking and reading this and looking at the pictures. So, in short, the unit could have been protected a whole lot better than it was.
Q. I'm going to show you a couple pictures first, and then

I'm going to ask you about the packing condition. If you could describe, based on your experience, what internal packaging and bracing means from your perspective?

A. Well, it's simple. Nobody has really pointed out that in this picture that is very demonstrative of what the problems are. The tray is left rested right against the wall of the crate. And it looks like what happened during movement is it just kept bouncing and bouncing and bending. There was nothing to hold the crate, that the unit is inside the crate itself. The construction of the crate, to be honest with you, I've seen much worse. I've seen much worse. It didn't fit all the

157

specifications of the National Motor Freight Classification, but it could have been a lot worse. The problem here and I think why this is apparent from the notation made at the time of pick up, the time of delivery is because the outside of the crate didn't look that bad. The problem was inside the crate. And there was nothing there to protect the unit from moving around during all that vibration. This moved from California to Pennsylvania. It didn't go from Erie to Allentown. It went across country, through a lot of roads.

Q. Are some of the things that could have been done would be wood bracing within the cabinet, as well as foam cabinet within the cabinet?

MR. DELANEY: Objection, leading.

THE COURT: It is leading, sustained.

BY MR. COHEN:

Q. How would you describe what internal measures should have been taken?

A. There should be some type of protection to keep it from moving. There are statements indicating that the unit was squared in down at the bottom. We have to remember this crate was reused two or three times. So those nailing and renailing the bottom and unbolting would have made that all that much more susceptible to the movement. Any type of protection on the top, if this tray wasn't here, really would be beneficial. The tray should probably be disassembled from the unit and the

crate could have been smaller and contained. But with that tray there, it allowed the top of the unit probably to bounce around and bend during transportation. The tray should have been, I think instead of the interior package, if the tray would have been taken off the crate would have been a smaller, there would have been no room for it to move. With that tray there it just was a disaster waiting to happen.

Q. Let's switch gears again on everybody here. There was testimony regarding this exhibit, Central Transport 7, can you look at it, Mr. Cackowski, this is the original copy in front of you in the book, it's number seven. Did you write this letter?

A. Yes, I did.

Q. It says "we have conducted an investigation of your claim and have found no liability on our part." What investigation was conducted?

A. When a claim comes into our office in Warren, Michigan, we evaluate all the documents associated with the shipping. In this case the bill of lading would have been reviewed with the delivery -- and reviewed. Inspection report and any pictures. Along with any internal documents that may have been associated with the movement of the freight during our handling.

Q. It says "we hold a clear delivery receipt with no notation of any discrepancy at time of delivery. We also have no record of any discrepancy with this shipment while in our

possession." Let's go over the standard operating procedure for the dock workers at Central Transport. If there is damage to freight on its journey from California to Pennsylvania, is it standard operating procedure and practice and habit of the Central Transportation employees to note that damage and send it in to your department for a claim file?

A. Yes. If there's damage within the system, it's to the dock man's best interest to notate the damage. If he doesn't, if somebody else handles it after him and indicates it's damaged, he would be responsible for this, reprimanded if need be.

Q. In your claim file did you have any notation of damage in route?

A. We did not.

Q. And the delivery receipt was signed by the receiver of the freight clean?

A. Correct.

Q. Did you have an inspector go out?
A. Yeah, apparently after delivery, George, of course, was called and he went out to the delivery site. And typically if there's a discrepancy, either note at the time of delivery or at times if there is something after delivery. Requests inspection, we will have an inspection be performed to protect our interests and to document the situation as it is at that point in time.

Q. Showing you the inspection report for a second. Have you seen, I'm blowing it up here, if you look at Exhibit CT-9 in the book, it's the whole thing, is there an inspection report which was generated at the request of Central Transport?
A. Yes, it is.
Q. It says in the circle part here on the screen "tip and tell not activated." We've heard a little bit about the tip and tell, why don't you tell us what the tip and tell is about?
A. A tip and tell is basically that, and there are different forms of them. They indicate typically it's by an indicator or something that when the unit has been tipped to a certain

degree, there will be ink that will stay to that degree. And
it's basically a tip or teller. Kind of tells what transpired
with the shipping container at the time of transit. It's
normally used in transportation.

Q. This inspection report says tip and tell not activated.
What does that tell you about whether it tipped?

A. Well, I guess that would indicate that it did not tip
during transportation.

Q. Based on your evaluation of the photos, the inspection
report, the testimony, and your experience, have you come to a
conclusion as to what caused the damage to this machine?

A. Well, the cause was due to, I believe, the packaging of
the unit and the allowing of it to move with the inside not
being secured.

161

MR. COHEN: Your Honor, I'd like to introduce the
exhibits that I've referred to during the course of the
examination, including CT-3, CT-4, and CT-7. As well as a copy
of the page from the National Motor Freight Classification,
which we have marked, your Honor.

THE COURT: Well, just identify it for the record.

MR. COHEN: Yes, I'm sorry. This is page 200 of the National Motor Freight Classification book.

THE COURT: How is it marked?

MR. COHEN: CT-16.

THE COURT: Those exhibits are all admitted.

MR. COHEN: I do have one final question, I apologize, your Honor, with respect to this witness.

BY MR. COHEN:

Q. In the correspondence that you prepared denying the claim, which is found at CT-7, let me put that up for the jury, you indicate in there that "note, as you are aware per item 780 in CTII 100 rules tariff our liability is limited to $10 per container." Okay. Why did you write $10 instead of 10 cents?

A. That would be $10 per pound per container. I was unaware that it was used. We after this at this point in time our liability for new articles was $10 a pound. And this claim was filed for 120,000 plus. So the shipment weighed 5,200 pounds. So the maximum liability would have been $52,000. I was unaware at the time that this was a used piece of equipment.

Q. Subsequently, they reduced this claim, correct?
A. Subsequently reduced their claims after the repairs were made.
Q. The note on the bottom, it says another "note, per the bill of lading, this shipment was moved at Class 50. We are uncertain as to what NMFC item number this shipment may have moved under. No support for this class was provided." Why did you put in that notation?
A. Well, I thought there would be some further communication in regards to this claim. And I wanted to record maybe I was missing something, maybe this was a Class 50 item that I was unaware of. So I was giving them the opportunity to provide support for that Class 50 that they shipped the merchandise under.
MR. COHEN: Thank you, Mr. Cackowski, I have no further questions right now.
THE COURT: Members of the jury, we're going to break at 4:15 today. I got a matter I have to attend to. Mr. Cohen, how many more witnesses do you have besides this gentleman?
MR. COHEN: Your Honor, the only witness that

Central Transport has left is the truck driver. As we discussed earlier, he will be available tomorrow morning to testify.

THE COURT: All right. Will he be relatively brief,

do you think?

MR. COHEN: Yes.

THE COURT: How many witnesses do you have, Mr. Knox?

MR. KNOX: I believe we're going to have two.

THE COURT: Okay, go ahead.

CROSS-EXAMINATION

BY MR. KNOX:

Q. Good afternoon, Mr. Cackowski.

A. Good afternoon.

Q. Mr. Cackowski, are you familiar with Central Transport's OS&D manual?

A. Yes.

Q. In fact, aren't you one of the contributors of the OS&D manual?

A. Yes, I was.

Q. I'm showing you a page from the manual, do you recognize that?

A. Yes, I do.

Q. Is that in fact a cover page for the OS&D manual?

A. Yes, it is.

Q. And that is your name on the front?

A. Yes, it is.

Q. I'm going to direct your attention to a page in the OS&D manual titled pick up driver responsibilities, bill of lading

164

verification. Do you see that?

A. Yes, I do.

Q. In this section are you aware of any procedures for checking the freight off the bill of lading that you mention that the driver must verify the class of a certain item?

A. The driver won't be educated to verify the class of an item.

Q. Interestingly, like in paragraph three, there's a notation about bundles and skids, specific skids should be called skids, bundles should be called bundles, drums, crates, etc., plus as noted a comment. Do you see that?

A. Yes, I do.

Q. Were you here in the courtroom when Mr. Horetsky testified?

A. Yes, I was.

Q. Did you hear him testify more or less that it's common for Central Transport as the carrier to accept items generically described as a skid or crate?

A. I am not sure exactly what Mr. Horetsky indicated.

Q. You don't remember that testimony?

A. I don't remember it like that, no.

Q. As you sit here today, knowing that provision, specifically paragraph three in the IS&D manual, not withstanding Mr. Horetsky may have said, you can't remember, do you agree that Central Transport accepts goods generically

165

described as one crate, one pallet as such?

A. No, you're misinterpreting what is being said there. All that is indicating is that the shipper has the responsibility of properly indicating the type of packaging that's being shipped. The crate should be called a crate. If it calls for, the bill of lading says one crate, the driver to pick up one crate. If it's a bundle and the bill of lading says a crate, the driver should say no, that's wrong. You got to change the bill of lading. That's all that is saying.

Q. I'm sorry. What if something does say one crate as it does on the bill of lading here, is that a sufficient description for the truck driver of Central Transport to identify and pick up the crate?

A. For the truck driver, yes.

Q. Mr. Cackowski, very briefly, though, you testified a little bit about your background in claims?

A. Uh-huh.

Q. Did you ever drive a truck?

A. No, I haven't.

Q. Have you ever operated a forklift?

A. No, I haven't.

Q. Mr. Cackowski, would you agree from the time the crate was picked up in California until it was taken all the way to Pennsylvania, that this crate was in a sole possession of

Central Transport?

A. It should have been, yes.
Q. It should have been?
A. Well, we have agents that work for us in different areas. But they would be under the control of Central Transport.
Q. Are those agents forklift drivers?
A. Could be a forklift driver, could be truck drivers, could be, but they would all be under the control of Central Transport.
Q. Mr. Cackowski, a Class 50 or Class 100 designation, is there any correlation as to how fragile an item might be?
A. If you're talking about the people who determine the classification rating, yes.
Q. It does?
A. It would be one of the factors when establishing the class for an item number. Item number, for example, when I indicated class -- they would take into consideration when they're putting that cost of class on, one of the variables would be how fragile, how fragile is the unit. Whether it's in

a fragile case or not.

Q. Is merely one factor?

A. Merely one factor, there are numerous factors.

Q. I believe your testimony is this item should be classed as a Class 100?

A. The freight classification and description of the articles, yes.

Q. Are all Class 100 fragile?

A. You couldn't say all items that are classified as 100 are fragile. You can make or non clarifications there.

Q. Exactly on Class 100 doesn't necessarily communicate a fragile item, is that correct?

A. No. I don't know where you're going with that, it doesn't correlate.

THE COURT: Hang on a second. Start all over again, just ask the question, if you don't understand, just tell him you don't understand it, request that he ask the question again. This is the last run through on this class, I'm trying to move this along, we've heard a lot about this. Go ahead.

BY MR. KNOX:

Q. If I'm a truck driver and I see an item that is marked as Class 100, does that tell me that it's fragile?

A. No.

Q. Mr. Cackowski, isn't it true at the time you were investigating this claim, that you didn't even know who identified the class on the bill of lading?

A. I don't understand the question.

Q. At the time you were investigating this claim, isn't it true, I believe you stated this in your deposition, that at the time you were investigating this claim, you did not even know who identified the class on the bill of lading?

A. Who identified the class, I don't know what you mean by identified.

Q. Who listed it as Class 50?

A. I wouldn't personally know who did that, no. There was a bill of lading issued by Logistics Plus. From reviewing the information, now I would only assume that Logistics Plus did that. But that would be an assumption.

Q. I saw on one of the documents, I've seen in your testimony something to the effect that Class 50 is in fact the cheapest rate on a shipment, is that correct?
A. That is correct. Given it cost less on class, I don't think it would be allowed.
Q. Mr. Cackowski, I want to show you that letter again that I believe is CT-7, again, that's the letter that you authored?
A. Yes.
Q. Isn't it true that the two bases for denying Accu-Spec's claim in that letter are that you held a clear delivery, you had no record of discrepancy in any shipment, those are the two main bases, is that correct?
A. Correct.
Q. There is the mention of misclassification, if you will, is merely just noted at the bottom, isn't that correct?
A. It's noted at the time, I didn't fully investigate that at the time. As we go into it, of course, we know that is correct. My initial thoughts were correct.
Q. And you testified I think lastly in response to questions

from Mr. Cohen the one line in here about $10 per pound per container, are you talking about limitation of liability, you would agree that only applies, the limitation of liability if in fact this tariff applies?

A. What tariff?

Q. Your tariff?

A. Our tariff does apply.

Q. I'm not saying it does or doesn't, I'm saying it only applies, that limitation only applies if the tariff applies, if it's in effect?

A. If it's a shipment we're handling, yes.

Q. Did you conduct the investigation into this entire claim, initially you were the only person?

A. I reviewed the claim paperwork that came in.

Q. Did you make a determination whether the goods were new or used?

A. Not at the time, I didn't have enough facts to base that information on, nor did I need them. Because we did have a clear delivery receipt. It was denied, the shipment was delivered of contract, carriage expired and the shipment was delivered without exception. Just the bill of lading was signed, the delivery was signed clear.

Q. Last thing, Mr. Cackowski. After the damage to the freight was discovered here in February of 2003, you did in fact receive a claim against Central Transport exclusively from

Accu-Spec, is that correct?
A. That is correct.
Q. Isn't it true you also received about a month later, specifically in May of 2003, a letter from Accu-Spec's counsel demanding payment from Central Transport and Central Transport only?
A. I don't recall the exact information within that letter.
MR. KNOX: Thank you very much, nothing further.
THE COURT: Mr. Delaney.
MR. DELANEY: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. DELANEY:
Q. Mr. Cackowski, I'm Patrick Delaney, I represent Accu-Spec. Am I correct that based on your letter, that is CT-7, that you denied this claim on April 23, 2003?
A. I don't have the letter up there, if that's the date,

that's fine.

THE COURT: Is that a stipulated to date, the dates on the letter?

MR. COHEN: The date of April 23rd?

THE WITNESS: Yes.

BY MR. DELANEY:

Q. Prior to that date had you contacted anyone at Accu-Spec?

A. No.

Q. Prior to that date had you contacted anyone from Dage?

A. No.

Q. Prior to that date had you contacted anyone from Logistics Plus?

A. I don't believe so.

Q. Prior to that date had you talked to George Horetsky about this claim?

A. I'm not certain -- no, I'm not certain on that one.

Q. Prior to that date had you interviewed the inspector that Mr. Horetsky had arranged from MTI inspecting?

A. There would be no reason to, sir.

Q. Prior to this date did you speak with the driver who picked up that package in California?

A. No reason to do so.

Q. Prior to that date did you pick up the phone and call the driver that dropped the package off?

A. There would be no reason to, sir.

Q. Prior to that date did you physically examine the crate?

A. On the inspection report I did, sir.

Q. I don't mean that. Did you physically examine the crate?

A. Sir, there is no need to do that.

Q. My question is did you examine the crate?

A. Sir, there is no need to do so, no.

THE COURT: Excuse me, listen to his question and answer it.

THE WITNESS: And I thought I did.

172

THE COURT: You just indicated that you thought that there was, you were ships passing in the night. So just listen very carefully and answer the question. Go ahead.

BY MR. DELANEY:

Q. Prior to the date April 23, 2003, did you physically examine the equipment?
A. Not physically, no.
Q. Prior to the date had you made a determination of the route by which this equipment had been moved from California to Pennsylvania?
A. I would have looked at that, yes.
Q. And prior to April 23, 2003, did you attempt to contact any other personnel of Central Transport that would have handled the crate between California and Pennsylvania?
A. No, sir.
Q. You refer in your letter of April 23rd to completing your investigation. Am I correct that you did none of those things as part of your investigation, however?
A. My investigation, the information that was provided with the delivery receipt and bill of lading and the inspection report encompassed that information. There is no reason to do each one of those individually.
Q. Did you see pictures prior to denying the claim on April 23, 2003, the pictures of the damage to the crate and equipment?

A. Yes, I did.
Q. When did you review those?
A. I would have reviewed them when I reviewed the claim.
Q. And they came with the claim?
A. There would have been some pictures typically with an inspection report and the inspection service, I don't know if there the same pictures you have in your presentation or not.
Q. Do you dispute that Accu-Spec never received any shipping documents from Central Transport or from Logistics Plus before the equipment arrived on February 14, 2003?
A. I have no idea, we were not in communication with Accu-Spec, they were not our customer in the case.
Q. My next question. There is no relationship between Central Transport and Accu-Spec, is there?
A. No, there's not.
MR. DELANEY: That's all the questions I have of this witness.
THE COURT: Anything further of this witness?
MR. COHEN: No, your Honor.

THE COURT: Thank you, sir, you're excused.

MR. COHEN: I don't want to keep anybody any longer --

THE COURT: Then you're excused. Members of the jury, that's it for today. All right, you folks be here at 9 o'clock tomorrow. We'll get through with the testimony. Then

we have something called a charge conference where I sit down with the lawyers, we have to hash out exactly what I'm going to tell you or not tell you in terms of my instructions. We'll do that probably late tomorrow morning after the testimony. So unless something unforeseen happens, you'll be deliberating the case tomorrow morning. Remember what I told you, don't talk about the case, don't let anybody talk about the case to you. We're in recess until 9 o'clock tomorrow morning.

(Whereupon, at 4:10 p.m., the Jury Trial proceedings were adjourned for the day.)

- - -

C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

____

Ronald J. Bench